

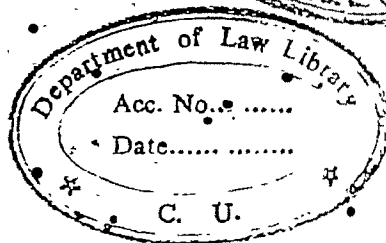
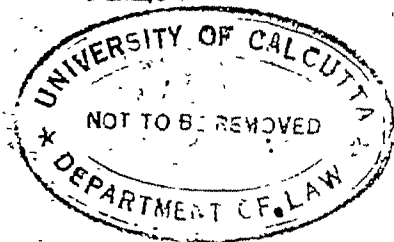
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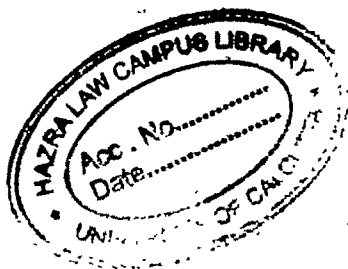
**REPORTS OF CASES.**

DECIDED BY THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL ON APPEALS  
FROM INDIA  
AND  
BY THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.

**Vol. XXXIV.**  
(July to December).  
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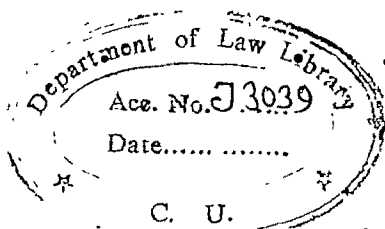


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# JUDGES OF THE HIGH COURT.

## 1921.

### Chief Justice.

The Hon'ble Sir Lancelot Sanderson, Kt. K.C.

### Principal Judges.

The Hon'ble Sir John George Woodroffe, Kt.

- „ Sir Asutosh Mookerjee, Kt. C.S.I.
- „ Sir Nalini Ranjan Chatterjea, Kt.
- „ Sir William Teunon, Kt.
- „ T. W. Richardson.
- „ C. P. Beachcroft (*on leave*).
- „ H. Walmsley.
- „ W. E. Greaves.
- „ B. B. Newbould.
- „ G. C. Rankin.
- „ C. C. Ghose.
- „ P. L. Buckland.
- „ H. J. Pearson.
- „ Z. R. Z. Suhrawardy.
- „ E. B. H. Panton (*offg.*).
- „ A. H. Cuming (*offg.*).
- „ Bepin Behari Ghose (*addl.*)
- „ A. J. Chotzner (*offg.*)

### Advocate General.

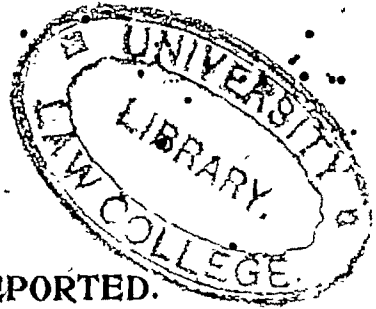
The Hon'ble Mr. T. C. P. Gibbons, K.C.

### Standing Council.

Mr. B. L. Mitter.

### Senior Government Pleader.

Babu Ram Charan Mitra, C.I.E.



## TABLE OF CASES REPORTED.

### Vol. XXXIV.

#### PRIVY COUNCIL.

|                                                                         | PAGE. |
|-------------------------------------------------------------------------|-------|
| Arumilli Perrazu v. Arumilli Subbarayadu ... ..                         | 56    |
| Ghulam Abbas Khan v. Musammat Amatul Fatima ... ..                      | 113   |
| Gulab Singh v. Diwan Bahadur Ballabhdas ... ..                          | 1     |
| Malayandi Appayasami Naicker v. The Midnapur Zemindary Co. Ltd : ... .. | 9     |
| Musti Venkata Jagannadha Sarmia v. Musti Veerabhadrayya ... ..          | 16    |
| Peary Mohan Mukerji, Raja v. Monohar Mukerji ... ..                     | 86    |

#### APPEAL FROM ORIGINAL CIVIL.

|                                                                    |     |
|--------------------------------------------------------------------|-----|
| Hari Singh Nehal Chand v. Kankinarah Co. Ltd ; ... ..              | 39  |
| Hurmukhroy Ram Chunder v. The Japan Cotton Trading Co Ltd : ... .. | 253 |
| Jnanendra Krishna Bose v. Sinclair Murray & Co. ... ..             | 173 |
| Sukhlal Karnani v. The Official Assignee of Calcutta ... ..        | 351 |

#### APPEAL FROM INSOLVENCY JURISDICTION.

|                                         |     |
|-----------------------------------------|-----|
| Nathmull v. Goneshmull Jivanmull ... .. | 349 |
|-----------------------------------------|-----|

#### APPELLATE CIVIL

|                                                                                      |     |
|--------------------------------------------------------------------------------------|-----|
| Abdul Hossain v. Asfaruddin ... ..                                                   | 481 |
| Abdul Majid Basunia v. Raja Mahendra Ranjan Rai Chaudhuri ... ..                     | 465 |
| Agent, B. N. W. Railway Company v. Jagannath Agarwala ... ..                         | 475 |
| Annada Prosad Ghosh v. Upendra Nath Dey Sircar ... ..                                | 293 |
| Baranashi Koer v. Bhabadeb Chatterjee ... ..                                         | 167 |
| Bejoy Chand Mohatap Bahadur, Maharajadhiraj, Sir v. Krishna Chandra Mukherjee ... .. | 275 |
| Bepin Krishna Ray v. Jogeshwar Ray ... ..                                            | 256 |
| Bharat Ramanuja Das Mohant v. Sarat Karaini Dasi ... ..                              | 96  |
| Bhubaneswar Bhattacharjee v. Dwarkeswar Bhattacharjee ... ..                         | 508 |
| Bhudeb Mookerjee v. Kalachand Mallik ... ..                                          | 315 |
| Bhupendra Narain Singh Bahadur v. Madar Bux Sheikh ... ..                            | 399 |
| Bibi Jinjira Khatun v. Mahomed Fakirulla Mea ... ..                                  | 444 |
| Byomkes Seth v. Bhut Nath Pal ... ..                                                 | 489 |
| Chairman, Jalpaiguri Municipality v. Jalpaiguri Tea Company Ltd ... ..               | 283 |
| Chaitanya Charan Set v. Mohamed Yusuf ... ..                                         | 299 |
| Chandra Nath Sorma Motayed v. Sheikh Inamdi ... ..                                   | 369 |
| Gangadhar Kalwar v. Sekali Tellni ... ..                                             | 281 |
| Gopal Krishna Nath v. Hari Nath Kapurth ... ..                                       | 157 |

|                                                                                         | PAGE. |
|-----------------------------------------------------------------------------------------|-------|
| Gopal Krishna Sil v. Abdul Samad Chaudhuri ... ..                                       | 319   |
| Govinda Nath Chaudhuri v. Basiruddin Mandal ... ..                                      | 183   |
| H. H. Maharaja of Cooch-Behar v. Raja Mahendra Ranjan Rai Chaudhuri ... ..              | 465   |
| Hamida Rahaman v. Jamila Khatun ... ..                                                  | 123   |
| Hemangini Debi, Rani v. Sarat Sundari Debya ... ..                                      | 457   |
| Jagannath Marwari v. Chandni Bibi ... ..                                                | 432   |
| Jogendra Nath Saha Chaudhuri v. Maharaja Jagadindra Nath Ray Chaudhuri of Natore ... .. | 133   |
| Jogobondhu Pal v. Rajendra Nath Chatterjee ... ..                                       | 29    |
| Johar Mull Bhutra v. Jatindra Nath Bose ... ..                                          | 79    |
| Jyot Kumar Mukherjee, Raja v. Jadu Nath Bose ... ..                                     | 160   |
| Kristo Das Law, Raja v. Abdul Karim ... ..                                              | 35    |
| Krishna Kishore De v. Nagendrabala Chaudhurani ... ..                                   | 333   |
| Kusum Kumari Dasi v. Dasarathi Sinha ... ..                                             | 323   |
| Luchiram Motilal v. Radha Charan Poddar ... ..                                          | 107   |
| Madhu Sudan Saha Chaudhuri v. Debendra Nath Sarkar ... ..                               | 76    |
| Maharaj Bahadur Singh v. Suresh Chandra Roy ... ..                                      | 364   |
| Mesbahuddin Ahmed Chowdhury v. Abdul Borkat Ahamadulla ... ..                           | 119   |
| Mohan Molla v. Baru Bibi ... ..                                                         | 524   |
| Mohini Mohan Banerjee v. Secretary of State for India in Council ... ..                 | 188   |
| Mokbul Ali Sadagar v. Basarat Ali ... ..                                                | 485   |
| Nibaran Chandra Mookerjee v. Nirupama Debi ... ..                                       | 563   |
| Nilambar Ghosh v. Mir Mohasanuddin ... ..                                               | 77    |
| Paban Khan v. Badal Sardar ... ..                                                       | 498   |
| Paresh Nath Pal Choudhury v. Ismail Sardar ... ..                                       | 195   |
| Prasannamayee Debi v. Baikuntha Nath Chatteraj ... ..                                   | 384   |
| Profulla Chandra Ghose v. Baburam Mandal ... ..                                         | 462   |
| Promotha Nath Ray Chaudhuri v. Dinamani Chaudhurani ... ..                              | 129   |
| Pulin Bihari Roy v. Mahendra Chandra Ghosal ... ..                                      | 405   |
| Ram Kanai Pal v. Purna Chandra ... ..                                                   | 494   |
| Sanatan Sant v. Dinabandhu Giri ... ..                                                  | 397   |
| Sarbeswar Patra v. Maharaja Sir Bijooy Chand Mohatap ... ..                             | 233   |
| Sarat Chandra Maiti v. Bibhabati Debi ... ..                                            | 302   |
| Sarojini Dasi v. Haridas Ghosh ... ..                                                   | 373   |
| Sashikanta Acharyya, Raja v. Raja Sarat Chandra Rai Chaudhuri ... ..                    | 415   |
| Sasi Kanta Acharyya Bahadur, Raja v. Sandhya Moni Dasya ... ..                          | 504   |
| Satis Chandra Das v. Umesh Narayan Chaudhuri ... ..                                     | 501   |
| Satis Chandra Ghosh v. Kalidasi Dasi ... ..                                             | 529   |
| Secretary of State for India in Council v. Annada Monan Roy ... ..                      | 205   |
| Secretary of State for India in Council, The v. Moulvi Wazed Ali Khan Pani ... ..       | 141   |
| Sudhanya Santra v. Basanta Kumar Sarkar ... ..                                          | 579   |

|                                        | PAGE. |
|----------------------------------------|-------|
| Tustee Mondal v. Kenaram Mondal ... .. | 518   |
| W. J. Rees v. John Young ... ..        | 178   |

CIVIL RULE.

|                                                   |     |
|---------------------------------------------------|-----|
| Jaminibala Debi v. Karali Prasad Mukherjee ... .. | 477 |
|---------------------------------------------------|-----|

REFERENCE UNDER COURT-FEES ACT.

|                                               |    |
|-----------------------------------------------|----|
| Sailendra Nath Mitra v. Ram Charan Pal ... .. | 94 |
|-----------------------------------------------|----|

APPELLATE CRIMINAL.

|                                                                               |     |
|-------------------------------------------------------------------------------|-----|
| Ainuddi Chowkidar v. King-Emperor ... ..                                      | 515 |
| Harl Charan Das v. King-Emperor ... ..                                        | 512 |
| Superintendent and Remembrancer of Legal Affairs, Bengal v. J. S. Mull ... .. | 203 |

CRIMINAL REFERENCE.

|                                   |     |
|-----------------------------------|-----|
| Emperor v. Abed Ali Tufani ... .. | 172 |
|-----------------------------------|-----|

CRIMINAL REVISION.

|                                                       |     |
|-------------------------------------------------------|-----|
| Ashutosh Das v. King-Emperor ... ..                   | 53  |
| Bhuban Chandra Hazra v. Nibaran Chandra Santra ... .. | 125 |
| Gogan Howladar v. Karimaddi Chawkidar ... ..          | 127 |
| Hemanta Kumar Sen v. King-Emperor ... ..              | 198 |
| Jiaratdin. Mohammed v. King-Emperor ... ..            | 578 |
| Kali Charan Kundu v. King-Emperor ... ..              | 200 |
| Rajani Kanta Shaha v. Idris Thakur ... ..             | 51  |



# TABLE OF CASES CITED.

## Vol. XXXIV.

### A.

|                                                                              | PAGE.              |
|------------------------------------------------------------------------------|--------------------|
| A. Mutoonissa v. Alla Hafiz (1867) 8 W. R. 468                               | 568                |
| Aas v. Benham (1891) 2 Ch. 244                                               | 406                |
| Abbas v. Fassihuddin (1897) I. L. R. 24 Calc. 413                            | 429                |
| Abdul v. Bai Jimbabai (1911) 14 Bom. L. R. 295                               | 452                |
| Abdul v. Jawahir (1914) I. L. R. 26 All. 250 P. C. ; 19 C. L. J. 626         | 425                |
| Abdul v. Mahomed (1916) 19 M. L. T. 346                                      | 331                |
| Abdul v. Thambuswami (1917) M. W. N. 93                                      | 480                |
| Abdul Gani v. Makbul (1914) I. L. R. 42 Calc. 745 ; 22 C. L. J. 223          | 233                |
| Abdul Hamid v. Kiran Chandra (1903) 7 C. W. N. 849                           | 472                |
| Abdul Hossain v. Turner (1887) L. R. 14 I. A. 111 ; I. L. R. 11 Bom. 620     | 531                |
| Abdul Majid v. Jew Narain Mahto (1888) I. L. R. 16 Calc. 233                 | 282                |
| Abid Hossein v. Dowcurry (1900) 6 C. W. N. 629                               | 471                |
| Achalram v. Kazim Hossain (1904-5) L. R. 32 I. A. 113 ; I. L. R. 27 All. 271 | 437                |
| Achhan Kuar v. Thakur Das (1895) I. L. R. 17 All. 125                        | 537, 569           |
| Achhutanand v. Ram Nath (1913) 18 C. L. J. 354                               | 334                |
| Achyutanand v. Jagannath (1914) 21 C. L. J. 66                               | 307                |
| Adams v. G. N. Scotland Ry. Co. (1890) 18 Rettie 1 ; 28 Scots. L. R. 579     | 50                 |
| Adams v. Henderson (1897) 168 U. S. 573                                      | 266                |
| Adityam v. Rama Krishna (1913) I. L. R. 38 Mad. 514                          | 347                |
| Administrator General of Bengal v. Asraf Ali (1900) I. L. R. 28 Calc. 227    | 369                |
| Adsetts v. Hives (1863) 38 Beav. 52 ; 140 R. R. 14                           | 348                |
| Aftar Ali v. Brojendra (1915) 24 C. L. J. 90                                 | 423                |
| Agency Co. v. Short (1888) 13 App. Cas. 793                                  | 139, 154, 305, 472 |
| Aghore v. Mahomed (1909) 11 C. L. J. 155                                     | 425                |
| Ahsawutta v. Hari Charan (1890) I. L. R. 17 Calc. 474                        | 404                |
| Ainsworth v. Weding (1896) 1 Ch. 673                                         | 272                |
| Akhil v. Tripura (1915) Unreported S. A. No. 847 of 1913                     | 233                |
| Alagamutten v. Devasagaya (1916) Mad. L. T. 147                              | 477                |
| Aldons v. Cornwell (1868) L. R. 3 Q. B. 573 ; 9 B and S. 607                 | 348                |
| Ali Husain v. Fazal Husain (1914) I. L. R. 36 All. 431                       | 445                |
| Ali Khan v. Inderpersad (1896) L. R. 23 I. A. 92 ; I. L. R. 23 Calc. 950     | 336                |
| Ajl Mamud Pramanick v. Bhagabati Debya (1898) 2 C. W. N. 525                 | 370                |

|                                                                                              | PAGE.         |
|----------------------------------------------------------------------------------------------|---------------|
| Alice & the Rosita, The (1868) L. R. 2. P. C. 214                                            | 181           |
| Amkjan v. Rambaran (1910) 12 C. L. J. 357                                                    | 342, 539, 571 |
| Alim v. Satis Chandra (1896) I. L. R. 24 Calc. 37                                            | 371           |
| All Church v. Hendon Union Assessment Committee (1891) 2 Q. B. 436                           | 289           |
| Allen v. Gillette (1887) 127 U. S. 589                                                       | 89            |
| Amat v. Lalji (1877) I. L. R. 1 All. 518                                                     | 416           |
| Amarnath, Lala v. Achan Kaur (1892) L. R. 19 I. A. 196; I. L. R. 14 All. 420                 | 344, 538, 570 |
| Amanat v. Imdad (1888) L. R. 15. I. A. 106, I. L. R. 15 Calc. 800                            | 470           |
| Ambika v. Satish (1898) 2 C. W. N. 689                                                       | 284           |
| Amir Begam v. Khwaja Saiyed Badruddin (1914) 19 C. L. J. 494; I. L. R. 36 All. 336           | 39            |
| Amrita v. Manick (1900) I. L. R. 27 Calc. 551                                                | 29            |
| Amrita Narayan v. Gaya Singh (1917) L. R. 45 I. A. 35; I. L. R. 45 Calc. 590                 | 548           |
| Amrit Sundari v. Serajuddin (1914) 19 C. W. N. 565                                           | 140, 471      |
| Anand v. Parbati (1906) 4 C. L. J. 198                                                       | 439           |
| Anand Hari v. Secretary of State (1905-6) 3 C. L. J. 316                                     | 142           |
| Anandrao v. Vasantao (1907) 5 C. L. J. 338; 11 C. W. N. 478; 9 Bom. L. R. 595                | 564           |
| Anantanarayana v. Savithri (1911) I. L. R. 36 Mad. 151                                       | 331           |
| Andrews v. Mitchell (1905) A. C. 78                                                          | 39            |
| Annada v. Annada (1916) 25 C. L. J. 155                                                      | 334           |
| Annada v. Gour (1920) 33 C. L. J. 457; 25 C. W. N. 496                                       | 548           |
| Annada v. Upendra (1921) 34 C. L. J. 293                                                     | 311           |
| Annamalai v. Malayandi (1905-6) I. L. R. 29 Mad. 426                                         | 101           |
| Anning v. Hartley (1858) 27 L. J. Ex. 145                                                    | 40            |
| Annoda v. Bhuban (1901) L. R. 28 I. A. 71; I. L. R. 28 Calc. 546                             | 344; 538, 571 |
| Anon (1575) 3 dyer 345a pl. 5                                                                | 162           |
| Arunachalla v. Velu Dayan (1870) 5 Mad. H. C. R. 215                                         | 424           |
| Asha Bibi v. Kadir (1909) I. L. R. 33 Mad. 22                                                | 527           |
| Ashgar v. Delroos (1877) I. L. R. 3 Calc. 324                                                | 344, 537, 569 |
| Asita Mohan Ghosh v. Nirode Mohan Ghosh (1916) 20 C. W. N. 901                               | 57            |
| Asmutoonnissa v. Alla Hafiz (1867) 8 W. R. 468                                               | 536           |
| Atar Singh v. Thakur Singh (1908) L. R. 35 I. A. 226; I. L. R. 35 Calc. 1039; 8 C. L. J. 359 | 575           |
| Atwari v. Maiku Lal (1908) I. L. R. 31 All. 1                                                | 478           |
| Aubhoy Churn v. Shoshi Bhusan (1888) I. L. R. 16 Calc. 155                                   | 583           |
| Ayenenussa Bibi v. Sheikh Isuf (1912) 16 C. W. N. 849                                        | 440           |
| Ayyavu Muppanar v. Niladatchi Ammal (1862) 1 Mad. H. C. R. 45                                | 60            |
| Azeezooonnissa v. Baqur Khan (1872) 10 B. L. R. 205                                          | 537, 569      |
| Azima Bibi v. Shamalanand (1912) I. L. R. 40 Calc. 378 P. C.; 17 C. L. J. 303                | 538, 570      |



|                                                                         | PAGE.        |
|-------------------------------------------------------------------------|--------------|
| Barry v. Butlin (1838) 2 Moo. P. C. 480                                 | 385          |
| Basant v. Secretary of State (1917) L. R. 44 I. A. 104 ; I. L. R.       |              |
| 44 Calc. 858 ; 25 C. L. J. 487                                          | 142, 306 466 |
| Basdeo v. Smidt (1899) I. L. R. 22 All. 55                              | 469          |
| Bashiram v. Srluath (1919) 23 C. W. N. 76 S. N.                         | 584          |
| Bastin v. Carew (1824) R. & M. 127                                      | 112          |
| Batuk Nath v. Munni (1914) L. R. 41 I. A. 104 ; I. L. R. 36 All. 284 ;  |              |
| 19 C. L. J. 574                                                         | 425          |
| Baunbi v. Narsingrao (1906) I. L. R. 31 Bom. 250                        | 452          |
| Behari v. Habiba (1886) I. L. R. 8 All. 267                             | 537, 569     |
| Behari v. Risal (1908) 5 A. L. J. 403                                   | 398          |
| Bejoy Chand Mahtab v. Tinkari (1926) 24 C. W. N. 617                    | 425          |
| Bejoy Krishna v. Lakshmi Narain (1919) 30 C. L. J. 433                  | 401          |
| Belcarin, The (1885) 10 P. D. 161                                       | 102          |
| Beni Prasad v. Lajja Ram (1916) I. L. R. 38 All. 452                    | 311          |
| Bentley v. Mackay (1862) 31 Bear 143 ; on appeal (1862) 4 DeG F & J.    |              |
| 279                                                                     | 550          |
| Berojali v. Nubokissen (1863) Sev. 238                                  | 327          |
| Bhagbat Dayal v. Debi Dayal (1908) L. R. 35 I. A. 48 ; I. L. R. 35      |              |
| Calc. 420 ; 7 C. L. J. 335                                              | 105          |
| Bhagwan Singh v. Bhagwan Singh (1899) L. R. 26 I. A. 153 ; I. L. R.     |              |
| 21 All 412 (1895) I. L. R. 17 All. 294                                  | 58, 60       |
| Bholanath v. Ajoodia (1873) 12 B. L. R. 336 ; 20 W. R. 65               | 575          |
| Bhola Nath v. Kanti (1897) I. L. R. 25 Calc. 311                        | 425          |
| Bhoudi Singh v. Dowlat Roy (1912) 15 C. L. J. 675                       | 270          |
| Bhowani v. Juggernath (1903) 9 C. L. J. 133                             | 577          |
| Bhrigu Nath v. Narsingh (1916) I. L. R. 39 All. 61                      | 421          |
| Bhubaneswari v. Nilcomul (1885) L. R. 12 I. A. 137 ; I. L. R. 12 Calc.  |              |
| 18                                                                      | 329          |
| Bhubon Mohini v. Gajalakshmi (1915) 19 C. W. N. 1330                    | 537, 569     |
| Bhup Indar v. Bijai Bahdur (1900) L. R. 27 I. A. 209 ; I. L. R. 23 All. |              |
| 152                                                                     | 416          |
| Bhutnath v. Manmatha (1909) 11 C. L. J. 98 ; 13 C. W. N. 1025           | 233          |
| Bhut Nath Naskar v. S. N. Dutt (1909) 12 C. L. J. 98 ; 13 C. W. N.      |              |
| 1025                                                                    | 238          |
| Bibi Jaras v. Hanfuddin (1909) 14 C. W. N. 389                          | 78, 79       |
| Bihari Lal v. Daud (1913) I. L. R. 35 All. 240                          | 331          |
| Bijoy Gopal v. Girindra (1914) I. L. R. 41 Calc. 793 ; 18 C. W. N.      |              |
| 673 ; 19 C. L. J. 620                                                   | 331          |
| Bilas Chandra v. Akshoy Kumar (1912) 15 C. L. J. 436 ; 16 C. W. N.      |              |
| 587                                                                     | 155          |
| Bilaso v. Dina Nath (1880) I. L. R. 3 All. 83                           | 31           |
| Bindo Bhoi v. Ram Chandra (1919) I. L. R. 41 All. 583                   | 471          |
| Bindubasini v. Giridhar (1909) 12 C. L. J. 115                          | 342, 57, 539 |
| Biprodas Pal Choudhury v. Azam Ostagar (1918) I. L. R. 46 Calc. 441     | 508          |



|                                                                                                                   |     |     |     |               |
|-------------------------------------------------------------------------------------------------------------------|-----|-----|-----|---------------|
| Bishen Chand Ral v. Asnaida Kumar (1883) L. R. 11 I. A. 164 ;<br>I. L. R. 6 All. 560                              | ... | ... | ... | 326           |
| Bisheswar v. Harbans (1907) 6 C. L. J. 659                                                                        | ... | ... | ... | 337           |
| Bissessuri v. Ram Purtap (1909) 14 C. W. N. 366                                                                   | ... | ... | ... | 468           |
| Bland v. Ross (1866) 14 Mo's P. C. 210                                                                            | ... | ... | ... | 179           |
| Blasson v. Blasson (1864) 2 DeG. Jand S. 665 ; 34 L. J. Ch. 18                                                    | ... | ... | ... | 328           |
| Bodh Singh v. Gunesh Chunder (1873) 12 B. L. R. 317 P. C.                                                         | ... | ... | ... | 575           |
| Boggs v. Varner (1843) 6 Wa. & Sor. 473                                                                           | ... | ... | ... | 269           |
| Bombay Burmah Trading Co. v. Smith (1894) I. L. R. 19. Bom 1                                                      | ... | ... | ... | 459           |
| Bombay Cotton Manufacturing Co. v. Moti Lal (1915) L. R. 42 I. A.<br>110 ; I. L. R. 39 Bom. 386 ; 21 C. L. J. 528 | ... | ... | ... | 380, 385      |
| Brajeshware v. Budhanuddi (1880) I. L. R. 6 Calc. 268 ; 7 C. L. R. 6                                              | ... | ... | ... | 333           |
| Brickwood v. Young (1905) 2 Com. L. R. 387                                                                        | ... | ... | ... | 443           |
| Brijlal v. Mahadeo (1911) 15 C. L. J. 432                                                                         | ... | ... | ... | 425           |
| Brij Lal v. Inda Kunwar (1913) I. L. R. 36 All. 187 ; 19 C. L. J. 469                                             | ... | ... | ... | 337           |
| Brij Lal v. Tejbal (1910) L. R. 37 I. A. 70 ; I. L. R. 32 All. 295 ;<br>11 C. L. J. 560                           | ... | ... | ... | 425           |
| Brohmanand v. Hem (1914) 11 C. W. N. 1016                                                                         | ... | ... | ... | 462           |
| Brojendra v. Abdul Razac (1915) 22 C. L. J. 283                                                                   | ... | ... | ... | 302           |
| Brojo Lal v. Tara Prasanna (1905) 3 C. L. J. 188                                                                  | ... | ... | ... | 399           |
| Brown v. Commissioner for Railways (1890) 15 App. Cas. 240                                                        | ... | ... | ... | 191           |
| Buccleuch v. Metropolitan Boards of Works (1870, L. R. 5 Ex. 221                                                  | ... | ... | ... | 255           |
| Buchi v. Jagapathi (1884) I. L. R. 8 Mad. 304                                                                     | ... | ... | ... | 348           |
| Buhuns, Mussumat v. Lalla Buhpore Lall (1872) 14 M. I. A. 496 ; 10<br>B. L. R. 159 ; 18 W. R. 157                 | ... | ... | ... | 3             |
| Bunsee v. Nuzuf Ali (1874) 22 W. R. 338                                                                           | ... | ... | ... | 419           |
| Bunseedhur v. Bindeseree (1866) 10 M. I. A. 454                                                                   | ... | ... | ... | 576           |
| Burendra Nath Bose v. Aghore Nath Bose (1920) 25 C. W. N. 525                                                     | ... | ... | ... | 297           |
| Burn v. Achumbit Roy (1873) 20 W. R. 14                                                                           | ... | ... | ... | 471           |
| Burrows v. Gradin (1843) 1 D and L. 213 ; 12 L. J. Q. B. 333                                                      | ... | ... | ... | 84            |
| Buzloor Ruheem v. Shumsoornissa (1897) 11 M. I. A. 551 ; 8 W. R.<br>P. C. 3                                       | ... | ... | ... | 343, 537, 569 |
| Bwilfa v. Pantypridd (1903) App. Cas. 426                                                                         | ... | ... | ... | 190           |
| Byjnath v. Badhoo (1868) 10 W. R. 486                                                                             | ... | ... | ... | 416           |

## C.

|                                                                                                    |     |     |     |     |
|----------------------------------------------------------------------------------------------------|-----|-----|-----|-----|
| Campbell v. Jackson (1885) I. L. R. 12. Calc. 41                                                   | ... | ... | ... | 476 |
| Catton v. Simson (1838) 8 A. & E. 136                                                              | ... | ... | ... | 348 |
| Cedar Rapids v. Lacoste (1914) A. C. 569                                                           | ... | ... | ... | 190 |
| Chairman of Behar Municipality v. Ramdeo Das (1920) Pat. 120 ; 4<br>Pat. L. J. 673                 | ... | ... | ... | 287 |
| Chairman of Chittagong Municipality v. Jogesh (1909) I. L. R. 37 Calc.<br>44                       | ... | ... | ... | 284 |
| Chairman of Giridih Municipality v. Srish Chandra (1908) I. L. R.<br>35 Calc. 859 ; 7 C. L. J. 631 | ... | ... | ... | 286 |

|                                                                               | PAGE.         |
|-------------------------------------------------------------------------------|---------------|
| Chairman of Joynagar Municipality <i>v.</i> Sailabala (1920) 25 C. W. N. 47   | 287           |
| Chairman, Municipal Board, Chapra <i>v.</i> Basudeo (1910) I. L. R. 37 Calc.  |               |
| 374 ; 11 C. L. J. 400                                                         | 290           |
| Chairman, Rajpur Municipality <i>v.</i> Nagendra Nath (1919) 29 C. L. J.      |               |
| 379 ; 23 C. W. N. 475                                                         | 287           |
| Chajju <i>v.</i> Sheo Sabai (1887) I. L. R. 10 All. 123                       | 282           |
| Chand Mea <i>v.</i> Asima Banu (1896) 10 C. W. N. 1024 ; 3 C. L. J. 431       | 270           |
| Chandanmull, Goneshmull <i>v.</i> Nippon Munkavi Kabushahi Kaisha             |               |
| (1920) A. O. O. No. 92 of 1919, heard on 17th February 1920                   | 254           |
| Chandra Kanta <i>v.</i> Lakshman (1916) 24 C. L. J. 57 ; 21 C. W. N. 430      | 425           |
| Chandra Kumar <i>v.</i> Prasanna Kumar (1921) 33 C. L. J. 451                 | 459           |
| Chappan <i>v.</i> Moidinkutti (1893) I. L. R. 22 Mad. 68                      | 493           |
| Charan Das <i>v.</i> Amir Khan (1920) L. R. 47 I. A. 255                      | 552           |
| Cheater <i>v.</i> Cater (1918) 1 K. B. 247                                    | 317           |
| Chellummall <i>v.</i> Garrow (1812) 2 Strange N. C. 1                         | 343, 537, 569 |
| Chengama <i>v.</i> Munisami (1896) I. L. R. 20 Mad. 75                        | 327           |
| Chotey Narain <i>v.</i> Ratan Koer (1894) L. R. 22 I. A. 12 ; I. L. R. 22     |               |
| Calc. 519                                                                     | 373           |
| Chowdry Deby <i>v.</i> Chowdry Dowlut (1844) 3 M. I. A. 347 ; 6 W. R.         |               |
| P. C. 55                                                                      | 336           |
| Chundury <i>v.</i> Koripalli (1916) 31 M. L. J. 39                            | 297           |
| Clark <i>v.</i> Girdward (1877) 7 Ch. D. 9                                    | 256           |
| Clarke <i>v.</i> Clarke (1795) 2 H. Bi. 399                                   | 328           |
| Clarke <i>v.</i> Saffery (1824) R. & M. 126                                   | 113           |
| Clydesdale Bank <i>v.</i> Pantou (1896) A. C. 381                             | 551           |
| Coles <i>v.</i> Coles (1856) L. R. 1 P. and D. 70                             | 107           |
| Collector of Madura <i>v.</i> Moottoo Ramalinga Sathupathy (1868) 12          |               |
| M. I. A. 397                                                                  | 58            |
| Collector of Poona <i>v.</i> Kashi Nath (1886) I. L. R. 10 Bom. 585           | 190           |
| Collector of Rajshahiye <i>v.</i> Doorga Soonduree (1865) 2 W. R. 210         | 472           |
| Collector of Trichinopoly, The <i>v.</i> Lekkamani (1874) L. R. 1 I. A. 268 ; |               |
| 14 B. L. R. 115                                                               | 7             |
| Compre <i>v.</i> Hicks, (1767) 7 T. R. 727                                    | 421           |
| Cooper <i>v.</i> Slade (1857-58) 6 H. L. C. 746                               | 385           |
| Corea <i>v.</i> Appuhami (1912) App. Cas. 237                                 | 432           |
| Corley <i>v.</i> Stafford (1857) 1 DeG. & J. 238                              | 267           |
| Cory <i>v.</i> Bristow (1877) 2 App. Cas. 262                                 | 289           |
| Crawshaij <i>v.</i> Mande (1818) 1 Swanston 508 ; 18 R. R. 132                | 406           |
| Crediton <i>v.</i> Exeter (1905) 2 Ch. 455                                    | 348           |
| Crossley <i>v.</i> Lightowler (1867) L. R. 2 Ch. App. 428                     | 518           |
| Culley <i>v.</i> Taylerson (1840) 11 A. & E. 1008                             | 440           |
| Cursety <i>v.</i> Crowder (1894) I. L. R. 18 Bom. 299                         | 48            |

D.

|                                                   |     |
|---------------------------------------------------|-----|
| Dagdu <i>v.</i> Bhana (1904) I. L. R. 28 Bom. 420 | 375 |
|---------------------------------------------------|-----|

|                                                                                                                                               | PAGE.         |
|-----------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Daines <i>v.</i> Heath (1847) 3 C. B. 938 ... ..                                                                                              | 348           |
| Dakeshur Pershad <i>v.</i> Rewat Mehton (1896) I. L. R. 24 Calc. 25 ... ..                                                                    | 297           |
| Dakhini Din <i>v.</i> Ali Asghar (1910) 7 I. C. 909 ... ..                                                                                    | 282           |
| Dakshina <i>v.</i> Sarodi (1893) L. R. 20 I. A. 160 ; I. L. R. 21 Calc. 142 ... ..                                                            | 416           |
| Damodar Narayan <i>v.</i> Dalglish (1910) L. R. 38 I. A. 62 ; I. L. R. 38<br>Calc. 432 ; 13 C. L. J. 512 ; 15 C. W. N. 345 ... ..             | 314           |
| Daulat <i>v.</i> Bhukandas (1886) I. L. R. 11 Bom. 172 ... ..                                                                                 | 426           |
| Daunt <i>v.</i> Lazard (1858) 27 L. J. Ex. 359 ... ..                                                                                         | 177           |
| Davenport <i>v.</i> Vickery (1861) 9 W. R. (Eng.) 701 ... ..                                                                                  | 4             |
| Davis <i>v.</i> Morris (1883) 10 Q. B. D. 463 ... ..                                                                                          | 405           |
| Daya <i>v.</i> Assistant Collector of Surat (1913) I. L. R. 38 Bom. 37 ... ..                                                                 | 191           |
| Debendra Nath Das <i>v.</i> Bibudhendra Mansingh (1915) I. L. R. 43 Calc.<br>90 ... ..                                                        | 493           |
| Debendra Nath <i>v.</i> Chairman, Taki Municipality (1920) 32 C. L. J.<br>210 ; 25 C. W. N. 45 ... ..                                         | 287           |
| Debi <i>v.</i> Rajbans (1918) Pat C. W. N. 134 ... ..                                                                                         | 423           |
| Debnarain <i>v.</i> Chairman of Baruipur Municipality (1911) I. L. R. 39<br>Calc. 141 ; (1913) I. L. R. 41 Calc. 168 ; 19 C. L. J. 205 ... .. | 286           |
| Deo Dem Fisher <i>v.</i> Prosser (1774) 1 Cowp. 211 ... ..                                                                                    | 440           |
| Deo Kuar <i>v.</i> Man Kuar (1894) L. R. 21 I. A. 148 ; I. L. R. 17 All. 1 ... ..                                                             | 538, 570      |
| Deo Narain <i>v.</i> Webb (1900) I. L. R. 28 Calc. 86 ... ..                                                                                  | 302           |
| Debroos Bennoo <i>v.</i> Nawab Ashgur (1875) 15 B. L. R. 167 ... ..                                                                           | 445, 537, 569 |
| Dena Bandhu <i>v.</i> Nohin Chandra (1903) 8 C. W. N. 437 ... ..                                                                              | 490           |
| Denonath <i>v.</i> Hurrnyarian (1873) 12 B. L. R. 349 ... ..                                                                                  | 575           |
| Deputy Commissioner of Kheri <i>v.</i> Khanjan Sing (1906) L. R. 34 I. A.<br>74 ; I. L. R. 29 All. 331 ; 5 C. L. J. 344 ... ..                | 105, 337      |
| Derry <i>v.</i> Sanders (1919) 1 K. B. 223 ... ..                                                                                             | 523           |
| Devine <i>v.</i> Wilson (1855) 10 Moo. P. C. 502 ... ..                                                                                       | 385           |
| Dhanmull <i>v.</i> Ram Chunder (1890) I. L. R. 24 Calc. 265 ... ..                                                                            | 307           |
| Dharmodas <i>v.</i> Nistarini (1887) I. L. R. 14 Calc. 446 ... ..                                                                             | 436           |
| Dharani Pragada <i>v.</i> Kadambari (1897) I. L. R. 21 Mad. 47 ... ..                                                                         | 18            |
| Dhondiba <i>v.</i> Kusa (1869) 6 Bom. H. C. R. 219 ... ..                                                                                     | 310           |
| Dhurm Das <i>v.</i> Shama Soondri (1843) 3 M. I. A. 229 ; 6 W. R. P. C.<br>43 ... ..                                                          | 312, 324      |
| Dillart <i>v.</i> Jones (1902) 229 Ill. 119 ; 11 Am. Cas. 802 ... ..                                                                          | 274           |
| Dinabandhu Nandi <i>v.</i> Mashuda Khatun (1912) 16 C. L. J. 318 ... ..                                                                       | 297           |
| Dinobundhoo <i>v.</i> Ram Dhone (1860) 9 W. R. 522 ... ..                                                                                     | 249           |
| Dinomoni <i>v.</i> Brojo Mohini (1901) L. R. 29 I. A. 24 ; I. L. R. 29<br>Calc. 187 ... ..                                                    | 138           |
| Dinomoni <i>v.</i> Elahudad (1903) 7 C. W. N. 678, (1904) 8 C. W. N. 843 ... ..                                                               | 131, 155      |
| Dino Nath <i>v.</i> Pratap Chandra (1899) I. L. R. 27 Calc. 30 ... ..                                                                         | 318           |
| Dobson <i>v.</i> Groves (1844) 6 Q. B. 637 ... ..                                                                                             | 48            |
| Doc <i>v.</i> Suckermore (1836) 5 A. & E. 703 ... ..                                                                                          | 582           |

|                                                                       |     |          |
|-----------------------------------------------------------------------|-----|----------|
| Doed Agar v. Brown (1853) 2 El. and Bl 331; 95 R. R. 580              | ... | 85       |
| Doe Dem Hollings v. Birds (1809) 11 East 49                           | ... | 440      |
| Doe Dem Jaun Bebee v. Abdollah (1838) Fulton 345                      | ... | 444      |
| Doe Dem White v. Cuff (1808) 1 Camp. 173                              | ... | 440      |
| Dolee Chand v. Oomda Khanum (1872) 18 W. R. 238                       | ... | 536, 568 |
| Doorga Narain Sen v. Ram Lall Chhutar (1881) I. L. R. 7 Calc. 330     | ... | 490      |
| Dougan v. Macpherson (1902) A. C. 197                                 | ... | 88       |
| Doyal v. Keramut (1871) 16 W. R. 116                                  | ... | 450      |
| Drew v. Drew (1855) 2 Macqueen 1                                      | ... | 48       |
| Dulhim Golab Koer v. Balla Kurmi (1898) I. L. R. 25 Calc. 744         | ... | 249      |
| Dunne v Dharani Kanta (1908) I. L. R. 35 Calc. 621                    | ... | 466      |
| Durga Prasad v. Tribeni Sing (1918) L. R. 45 I. A. 251; 28 C.L.J. 508 | ... | 18       |
| Dursan v. Bhowani (1913) 17 C. W. N. 984                              | ... | 422      |
| Dwijendra v. Purnendu (1910) 11 C. L. J. 189                          | ... | 432      |
| Dyer v. Green (1847) 1 Ex. 71                                         | ... | 348      |

El.

|                                                                                |     |          |
|--------------------------------------------------------------------------------|-----|----------|
| Eagleton v. Gutteridge (1843) 11 M. & W. 465                                   | ... | 3473     |
| Edinburgh Water Trust v. Clippens Oil Co. (1902) 4 F. 40; 39 Scots L. R. 860   | ... | 50       |
| Edwards v. Wickwar (1866) L. R. 1 Eq. 403; 35 L. J. Ch. 309                    | ... | 85       |
| Ellis v. Wadeson (1894) 1 Q. B. 714                                            | ... | 410      |
| Emperor v. Noni (1911) 15 C. W. N. 593; I. L. R. 38 Calc. 550                  | ... | 37       |
| Enayutulla, Sheikh v. Shaikh. Elaheebuksh (1864) W. R. Gap. No. Act. X. Ru. 42 | ... | 36       |
| Eshenchunder v. Shamachurn (1866) 11 M. I. A. 7; 6 W. R. P. C. 57              | ... | 179, 551 |
| Eunga v. Bezvada (1917) 17 Mad. W. N. 495                                      | ... | 308      |
| Exparte Corbett (1880) 14 Ch. D. 463                                           | ... | 405      |
| Exparte Dewdney (1808) 15 Ves. 479                                             | ... | 168      |
| Exp. Fernandez (1861) 10 C. B. N. S. 3. 128 R. R. 575                          | ... | 334      |
| Exparte Jerningham (1878) 9 Ch. D. 466                                         | ... | 350      |
| Exparte Kirkwood (1879) 11 Ch. D. 724                                          | ... | 350      |
| Exparte Lancashire Banking Corporation (1878) 10. Ch. D. 776                   | ... | 170      |
| Exparte Roffey (1815) 19 Ves. 468; 2 Rose 245                                  | ... | 170      |
| Exparte Ross (1827) 2 Gl and J. 46                                             | ... | 170      |
| Exparte Vanderlinden (1885) 20 Ch. D. 289                                      | ... | 350      |

F.

|                                                                               |     |         |
|-------------------------------------------------------------------------------|-----|---------|
| Faijuddi v. Asimuddi (1907) 11 C. W. N. 679                                   | ... | 426     |
| Faiyaz Husain v. Prag Narayan (1907) L. R. 34 I. A. 102; I. L. R. 29 All. 339 | ... | 96, 275 |
| Faizuddin v. Tincowri (1895) I. L. R. 22 Calc. 565                            | ... | 329     |
| Fakeer Mondul v. Arshad Molla (1906) 10 C. W. N. cl. XXX                      | ... | 581     |

|                                                                         | PAGE.         |
|-------------------------------------------------------------------------|---------------|
| Fate Chand v. Mansab (1897) I. L. R. 20. All. 442                       | 469           |
| Fatima Bibi v. Ahmad Baksh (1903) I. L. R. 31 Calc. 319 ; (1907)        |               |
| L. R. 35 I. A. 67 ; I. L. R. 35 Calc. 271 ; 7 C. L. J. 122              | 454           |
| Fazl Ahamma v. Rahim Bibi (1917) I. L. R. 40 All. 238                   | 454           |
| Fazlur Rahman v. Muhammad Umar (1917) 3 Pat L. W. 232                   | 454           |
| Fink v. Secretary of State (1907) I. L. R. 34 Calc. 599                 | 190           |
| Fisher v. Villamil (1911) 62 Fla. 472 ; 29 Am. Cas. 1003 ; 13 L. R. A.  |               |
| (N. S.) 90                                                              | 274           |
| Fowler v. Fowler (1859) 4 DeG. and J. 250                               | 264           |
| Freke v. Thomas (1792) 1 Salk 39 ; 1 Ld. Raym. 667                      | 460           |
| French v. Patton (1808) 9 East 351 ; 9 R. R. 571                        | 348           |
| Ful Chand v. Nazab Ali (1908) I. L. R. 36 Calc. 184 ; 9 C. L. J. 105... | 527           |
| Fulli v. Bassiruddi (1869) 4 B. L. R. 54 F. B. ; 12 W. R. 25 F. B.      | 336           |
| Furzun Hossein v. Jaun Bibee (1878) L. L. R. 4 Calc. 588                | 525           |
| Fuzzul Hossein v. Amjud Ali (1872) 17 W. R. 523                         | 344, 537, 569 |

## G.

|                                                                               |               |
|-------------------------------------------------------------------------------|---------------|
| Gabinda v. Kailash (1905) 15 C. L. J. 689                                     | 284           |
| Gagan v. Abejan (1911) 14 C. L. J. 180                                        | 312           |
| Gajapathi v. Gajapathi (1870) 13 M. I. A. 497 ; 14 W. R. P. C. 33 ;           |               |
| 6 B. L. R. 202                                                                | 549           |
| Gajraj v. Swami Nath (1916) I. L. R. 39 All. 13                               | 425           |
| Ganapat v. Gopahao (1899) I. L. R. 23 Bom. 636                                | 327           |
| Ganesh Dutt v. Jewach Thakoorain (1903) L. R. 31 I. A. 10 ; I. L. R.          |               |
| 31 Calc. 262                                                                  | 32            |
| Ganesh v. Purushotam (1908) I. L. R. 33 Bom. 311                              | 340           |
| Ganesh Narayan v. Malida Koer (1911) 13 C. L. J. 399                          | 48            |
| Ganesha v. Amrithasami (1918) Mad. W. N. 892 ; 23 Mad. L. T. 245...           | 421           |
| Ganga Ram v. Mihin Lal (1906) I. L. R. 28 All. 416                            | 308           |
| Ganga Sabai v. Lekhraj Singh (1886) I. L. R. 9 All. 253                       | 59            |
| Ganpat v. Bindbasini (1920) L. R. 47 I. A. 91 ; I. L. R. 47 Calc. 924         | 312           |
| Gardner v. Walsh (1855) 5 E. & B. 83 ; 103 R. R. 377                          | 347           |
| Garuradhwaja v. Superundhwaja (1900) I. L. R. 23 All. 37...                   | 228           |
| Geresh v. Bhuggobutty (1870) 13 M. I. A. 419 ; 14 W. R. P. C. 7.              | 343, 537, 569 |
| Ghanshyam Lal v. Ram Narain (1909) I. L. R. 31 All. 379                       | 426           |
| Ghurphekn v. Purnmeshar (1907) 5 C. L. J. 653                                 | 337           |
| Gibbert v. Lewis (1862) 1 DeG. J. & S. 38                                     | 550           |
| Gilbert v. Endean (1878) 9 Ch. D. 259                                         | 550           |
| Giriapa v. Ningapa (1892) I. L. R. 7 Bom. 100                                 | 60            |
| Girija Bai v. Sadasiv (1916) I. L. R. 43 I. A. 151 ; I. L. R. 43 Calc. 1031 ; |               |
| 24 C. L. J. 288                                                               | 575           |
| Girindra v. Trailokhya (1892) L. R. 21 I. A. 35 ; I. L. R. 20 Calc. 373       | 549           |
| Girish Chunder v. Soshi Shikhareswar (1900) L. R. 27 I. A. 110 ;              |               |
| I. L. R. 27 Calc. 951 (1969) (1905) I. L. R. 33 Calc. 329                     | 416, 426      |

|                                                                                                       | PAGE. |
|-------------------------------------------------------------------------------------------------------|-------|
| Glanibanta; The (1876) 1 P. D. 283 ... ..                                                             | 183   |
| Glassington v. Thwaites (1823) 1 Sim. & St. 124 ; 24 R. R. 153 ...                                    | 413   |
| Glenwood Lumber Co. v. Phillips (1904) App. Cas. 405 ... ..                                           | 430   |
| Gobind v. Doorga Prasad (1874) 14 B. L. R. 337 ; 22 W. R. 248 ...                                     | 574   |
| Gokul v. Sasimukhi (1911) 15 C. L. J. 204 ... ..                                                      | 412   |
| Gopala v. Sannasi (1915) 19 Mad. L. T. 137 ... ..                                                     | 426   |
| Gopal v. Lakhiram (1912) 16 C. W. N. 632 ... ..                                                       | 140   |
| Gopal Singh v. Laloo Lall (1909) 10 C. L. J. 27 ... ..                                                | 347   |
| Gopanand v. Lalla Gobind (1869) 12 W. R. 109 ... ..                                                   | 36    |
| Gopendra Chandra v. Tara Prasanna (1910) I. L. R. 37 Calc. 598 ...                                    | 275   |
| Gopini v. Lokenath (1911) 19 C. L. J. 414 Note ... ..                                                 | 136   |
| Gordon v. Gordon (1816-21) 3 Swam 400 ; 19 R. R. 230 ... ..                                           | 531   |
| Gordon v. Ogilvie (1899) 15 T. L. R. 239 ... ..                                                       | 523   |
| Goura Chowdhurain v. Chumnuin Chowdhury (1864) W. R. Gap.<br>No. 340 ... ..                           | 330   |
| Gour Chandra v. Prasanna (1906) I. L. R. 33 Calc. 812 ; 3 C. L. J.<br>363 ; 10 C. W. N. 783 ... ..    | 334   |
| Government v. Dayal (1906) 9 Bom. L. R. 99 ... ..                                                     | 191   |
| Government of Bombay v. Marwanji (1908) 10 Bom. L. R. 907 ...                                         | 193   |
| Gowri v. Viganeshvar (1892) I. L. R. 17 Bom. 49 ... ..                                                | 480   |
| Grant v. Maddox (1846) 15 M. and W. 737 ; 71 R. R. 815 ... ..                                         | 162   |
| Green v. Attenborough (1864) 3 H. and C. 461 ; 140 R.R. 562 ...                                       | 348   |
| Green v. Biddle (1823) 8 Wheaton U. S. 1. ... ..                                                      | 430   |
| Greenough v. Eccles (1859) 5 C. B. N. S. 786 ; 116 R. R. 865 ...                                      | 112   |
| Gulab Singh v. Gokuldas (1913) L. R. 40 I. A. 117 ; I. L. R. 40 Calc.<br>784 ; 17 C. L. J. 619 ... .. | 3     |
| Gunga Narain v. Radhika Mohan (1873) 21 W. R. 115 ... ..                                              | 472   |
| Gunga Narain v. Tilluck Ram (1888) L. R. 15 I. A. 119 ; I. L. R. 15<br>Calc. 533 ... ..               | 550   |
| Gunjra Kuar v. Ablakh Pande (1896) I. L. R. 18 All. 478 ... ..                                        | 307   |
| Gunnaiyan v. Kamakchi Ayyar (1902) I. L. R. 26 Mad. 339 ... ..                                        | 16    |

## H.

|                                                                                             |          |
|---------------------------------------------------------------------------------------------|----------|
| Hakim v. Najiban (1898) I. L. R. 20 All. 447 ... ..                                         | 537      |
| Hakim Lal v. Mooshahar Sahu (1907) I. L. R. 34 Calc. 999 ; 6 C. L. J.<br>410 ... ..         | 108      |
| Hamilton v. Royse (1804) 2 Sch. and Lef. 315 ... ..                                         | 269      |
| Hanmant v. Bhimacharya (1887) I. L. R. 12 Bom. 105 ... ..                                   | 329      |
| Hanuman v. Hanuman (1891) L. R. 18 I. A. 158 ; I. L. R. 19 Calc. 123                        | 470      |
| Haradas v. Secretary of State (1917) 26 C. L. J. 520 ... ..                                 | 141, 224 |
| Haradhan Debnath v. Bhagabati Dasi (1914) I. L. R. 41 Calc. 852 ;<br>19 C. L. J. 420 ... .. | 366      |
| Hardit v. Gurmukh (1918) 28 C. L. J. 437 ... ..                                             | 440      |
| Hareck Chand v. Bejoy Chand (1905) 2 C. L. J. 87 ... ..                                     | 329      |
| Hareck Chand Babu v. Charu Chandra Sinha (1910) 13 C. L. J. 102 ...                         | 278      |

|                                                                                                                 | PAGE.         |
|-----------------------------------------------------------------------------------------------------------------|---------------|
| Haridas v. Narotam (1911) 14 Bom. L. R. 237 ...                                                                 | 577           |
| Haridas Goswami v. Nistarini Gupta (1905) 5 C. L. J. 30 ...                                                     | 278           |
| Harihar Lal v. Gunendra Pershad (1905) 9 C. W. N. 1025 ; 1 C. L. J. 617. ...                                    | 197           |
| Hari Narain Mozumdar v. Mukund Lal Mundal (1900) 4 C. W. N. 814                                                 | 277           |
| Hari Sanker v. Kali Kumar (1905) 1 L. R. 32 Calc. 734 ...                                                       | 95            |
| Hari Saran v. Bhubaneswar (1888) L. R. 15 I. A. 195 ; 1 L. R. 16 Calc. 40 ...                                   | 312           |
| Harmanojee v. Ramprasad (1907) 6 C. L. J. 462 ...                                                               | 429           |
| Harmer v. Bean (1853) 3 C. and K. 307 ...                                                                       | 84            |
| Harvey v. Shelton (1844) 7 Beav. 45 ...                                                                         | 39            |
| Hassarat Bibi v. Golam Jaffar (1898) 3 C. W. N. 57 ...                                                          | 454           |
| Helan v. Durga Das (1906) 4 C. L. J. 323 ...                                                                    | 549           |
| Hemangini v. Haridas (1918) 3 Pat. L. J. 409 ...                                                                | 406           |
| Hemangini v. Kedar Nath (1889) L. R. 16 I. A. 115 ; 1 L. R. 16 Calc. 758 ...                                    | 32            |
| Hemanta Kumari v. Midnapur Zemindari Co. (1919) L. R. 46 I. A. 240 ; 1 L. R. 47 Calc. 485 ; 31 C. L. J. 298 ... | 105           |
| Hem Chandra v. Kali Prasanna (1903) 1 L. R. 30 Calc. 1033 ; 8 C. W. N. 1 ...                                    | 406           |
| Hetram v. Shadilal (1918) L. R. 45 I. A. 130 ; 1 L. R. 40 All. 407 ; 28 C. L. J. 188 ...                        | 270           |
| Hewson v. Shelley (1914) 2 Ch. 33 ...                                                                           | 460           |
| Hickson v. Lombard (1866) L. R. 1 H. L. 324 ...                                                                 | 551           |
| Himmat v. Lewhellen (1885) 1 L. R. 18 Calc. 486 ...                                                             | 347           |
| Hiralal v. Bai Asi (1897) 1 L. R. 22 Bom. 891 ...                                                               | 493           |
| Hira Lal v. Lokenath (1915) 19 C. W. N. 864 ...                                                                 | 319           |
| Hiran v. Sohan (1914) 18 C. W. N. 929 P. C. ...                                                                 | 331           |
| Hodges v. Delhi and London Bank (1900) L. R. 27 I. A. 168 ; 1 L. R. 23 All. 137 ...                             | 334, 539, 571 |
| Hoghton v. Hoghton (1852) 15 Beav. 278 ; 92 R. R. 421 ...                                                       | 550           |
| Holmes Oil Co. v. Pumpherston Oil Co. (1891) 11 Rettic 52 ; 28 Scots. L. R. 940 ...                             | 50            |
| Holywell Union v. Halkyn District Mines Drainage Co. (1895) App. Cas. 117 ...                                   | 289           |
| Hook v. A. G. Bengal (1921) L. R. 48 I. A. 187 ; 33 C. L. J. 405 ...                                            | 167, 419      |
| Horn v. Beard (1912) 3 K. B. 181 ...                                                                            | 85            |
| Houstoun v. Marquis of Silgo (1885) 29 Ch. D. 448 ...                                                           | 420           |
| Howell v. Metcalfe (1824) 2 Add. 348 ...                                                                        | 460           |
| Huddersfield Banking Co. v. Lister (1895) 2 Ch. 273 ...                                                         | 102, 157, 272 |
| Hughes v. Thomas (1811) 13 East 474 ...                                                                         | 421           |
| Hugli Mills Co. v. Secretary of State (1903) 12 C. L. J. 489 ...                                                | 191           |
| Hugnenin v. Baseley (1807) 14 Ves. 273 ...                                                                      | 553           |
| Hukumchand v. Hiralal (1879) 1 L. R. 3 Bom. 159 ...                                                             | 333           |

|                                                                                |     |     |          |
|--------------------------------------------------------------------------------|-----|-----|----------|
| Hukumchand v. Pirthichand (1918) 23 C. W. N. 721                               | ... | ... | 425      |
| Hunoomanpersaud v. Babooee Munraj (1856) 6 M. I. A. 393 ; 18 W. R. 81 note     | ... | ... | 331; 576 |
| Hur Dyai v. Roy Krishto (1875) 24 W. R. 107                                    | ... | ... | 437      |
| Huronath v. Indoo Bhoosan (1866) 6 W. R. Mis. 33                               | ... | ... | 419      |
| Hurriah Chunder v. Kali Sundari (1882) L. R. 10 I. A. 4 ; I. L. R. 9 Calc. 482 | ... | ... | 492      |
| Hurro Doyal v. Mahomed Gazi (1891) I. L. R. 19 Calc. 699                       | ... | ... | 404      |

## I.

|                                                                                                           |     |     |          |
|-----------------------------------------------------------------------------------------------------------|-----|-----|----------|
| I. G. S. N. R. Co. v. Lal Mohan (1915) 22 C. L. J. 241                                                    | ... | ... | 476      |
| Ibbs v. Richardson (1831) 9 A. & E. 849                                                                   | ... | ... | 416      |
| Ibrahim Ali v. Hadi (1881) 1 All. W. N. 15                                                                | ... | ... | 468      |
| Ibrahim v. Saiboo (1907) L. R. 34 I. A. 167 ; I. L. R. 35 Calc. 1 ; 6 C. L. J. 695                        | ... | ... | 445      |
| Ijjatulla v. Chandra Mohan (1907) I. L. R. 34 Calc. 954 ; 12 C. W. N. 285 ; 6 C. L. J. 255                | ... | ... | 430      |
| Iman Ali, Mahamed v. Husain (1898) L. R. 15 I. A. 161 ; I. L. R. 26 Calc. 81                              | ... | ... | 549      |
| Indrajit v. Lal Chand (1895) I. L. R. 18 All. 168                                                         | ... | ... | 347      |
| In re Barneds' Banking Corporation (1867) L. R. 3 Ch. App. 105                                            | ... | ... | 347      |
| In re Brook and Delcomyn (1864) 16 C. B. N. S. 403                                                        | ... | ... | 47       |
| In re Brunner (1857) 19 Q. B. D. 572                                                                      | ... | ... | 110      |
| In re Burilfa and Merthyr Dye Steam Collieries (1902) 2 K. B. 135                                         | ... | ... | 190      |
| In re Comillo Eitzan and Jewson & Sons (1895) 40 Sor. Jon. 439                                            | ... | ... | 47       |
| In re Coomber (1911) 1 Ch. 723                                                                            | ... | ... | 529, 563 |
| In re Cough and Aspatria (1903) 1 K. B. 574 ; (1904) 1 K. B. 417                                          | ... | ... | 191      |
| In re Dhanjibhoy (1907) 10 Bom. L. R. 701                                                                 | ... | ... | 191      |
| In re Dorabji (1907) 10 Bom. L. R. 675                                                                    | ... | ... | 191      |
| In re Drachenfels (1899) I. L. R. 27 Calc. 860                                                            | ... | ... | 152      |
| In re Kissory Mohan Roy (1916) 20 C. W. N. 1155                                                           | ... | ... | 351      |
| In re Lucas and Chesterfield Gas and Waterboard (1909) 1 K. B. 16                                         | ... | ... | 190      |
| In re May (1883) 25 Ch. D. 231                                                                            | ... | ... | 420      |
| In re Metcalfe (1822) 1 Add. 343                                                                          | ... | ... | 460      |
| In re Munji Khetsey (1890) I. L. R. 15 Bom. 279                                                           | ... | ... | 191      |
| In re Plews & Middleton (1845) 6 Q. B. 845                                                                | ... | ... | 28       |
| In re Rangaswami Iyenger (1913) Mad. W. N. 998                                                            | ... | ... | 112      |
| In re Sorabji (1908) 10 Bom. L. R. 696                                                                    | ... | ... | 191      |
| In re South American and Mexican Co. (1895) 1 Ch. 37                                                      | ... | ... | 102      |
| In the Goods of Cassidy (1832) 4 Hogg. 360                                                                | ... | ... | 460      |
| In the Goods of Newton (1802) 7 Ves. 460                                                                  | ... | ... | 460      |
| In the Goods of Phillips (1843) 3 Curt. 428 ; 7 Jar. 219                                                  | ... | ... | 460      |
| In the matter of Biseswarnath (1917) I. L. R. 40 All. 147                                                 | ... | ... | 469      |
| Isan Chandra v. Safatullah (L. P. 49 of 1920 decided by Mookerjee and Pantou JJ. on the 18th August 1921) | ... | ... | 423      |



|                                                                                         |               |
|-----------------------------------------------------------------------------------------|---------------|
| Ishan v. Ramranjan (1905) 2 C. L. J. 125                                                | 134, 481      |
| Ishan Chandra v. Ainuddin (1901) 5 C. W. N. 720                                         | 429           |
| Ismail v. Háfiz (1906) L. R. 33 I. A. 86 ; I. L. R. 33 Calc. 773 ; 3 C. L. J. 484       | 344, 538, 570 |
| Issur Ghose v. Hills (1864) W. R. F. B. Rule 148                                        | 249           |
| Issur Chander v. Nabo Krishto (1880) 7 C. L. R. 407                                     | 310           |
| Iswar v. Kali (1917) 27 C. L. J. 474                                                    | 119           |
| Ives v. Willans (1894) 2 Ch. 478                                                        | 17            |
| Izatunnessa v. Pertab (1909) L. R. 6 I. A. 203 ; I. L. R. 31 All. 583 ; 10 C. L. J. 313 | 334           |

## J.

|                                                                                         |          |
|-----------------------------------------------------------------------------------------|----------|
| Jadow v. Chhagan (1881) I. L. R. 5 Bom. 306                                             | 310      |
| Jagadindra Nath v. Hemanta Kumari (1911) 14 C. L. J. 319 P. C.                          | 472      |
| Jagadindra v. Secretary of State (1902) I. L. R. 20 Calc. 291 ; L. R. 30 I. A. 44       | 142      |
| Jagatjit v. Sarabjit (1891) L. R. 18 I. A. 165 ; I. L. R. 19 Calc. 159                  | 420      |
| Jairaj v. Radha (1913) I. L. R. 35 All. 257                                             | 340      |
| Jalan v. Assaram (1912) 22 C. L. J. 22                                                  | 493      |
| Janki Dass v. Mahabir (1913) 22 I. C. 240                                               | 298      |
| Janokee v. Raj Kristo (1871) 15 W. R. 292                                               | 419      |
| Jarat Kumari v. Bissessur (1911) I. L. R. 39 Calc. 245                                  | 373, 384 |
| Jehangir v. Hope Mills (1908) I. L. R. 33 Bom. 216                                      | 412      |
| Jitendra v. Mohendra (1914) 24 C. L. J. 62                                              | 423      |
| Jewraj v. Norwich Assurance Co. (1905) 5 Bom. L. R. 853                                 | 257      |
| Jodoonath v. Brojonath (1874) 12 B. L. R. 385                                           | 34       |
| Jogendra v. Baldeo (1907) I. L. R. 35 Calc. 961 ; 6 C. L. J. 735 ; 12 C. W. N. 127      | 134      |
| Jogendra Chandra v. Fulkumari (1899) I. L. R. 27 Calc. 77                               | 31       |
| Jogendra Nath Rai v. Baladeo Das (1907) I. L. R. 35 Calc. 961 ; 6 C. L. J. 735          | 440      |
| Joges v. Mokbul (1920) 25 C. W. N. 857                                                  | 488      |
| Jogeswar v. Ganga Bishun (1904) 8 C. W. N. 473                                          | 270      |
| Jograni v. Durga Prasad (1913) L. R. 41 I. A. 76 ; I. L. R. 36 All. 93, 19 C. L. J. 165 | 373      |
| Jawala Buksh v. Dhurum Singh (1866) 10 M. I. A. 511                                     | 468      |
| Joytara v. Mahomed Mobaruk (1882) I. L. R. 8 Calc. 975 ; 11 C. L. R. 399                | 472      |
| Juggurnath v. Shah Mahomed (1874) 14 B. L. R. 386 ; 23 W. R. 99 P. C.                   | 422      |
| Jugomohan v. Sarodamoyee (1877) I. L. R. 3 Calc. 149                                    | 34       |

## K.

|                                                                   |     |
|-------------------------------------------------------------------|-----|
| Kadambini Debi v. Kali Kumar Halidar (1899) I. L. R. 26 Calc. 526 | 523 |
| Kailas v. Fulchand (1871) 8 B. L. R. 474                          | 103 |

|                                                                                                 | PAGE          |
|-------------------------------------------------------------------------------------------------|---------------|
| Kailas Chandra v. Secretary of State (1910) 17 C. L. J. 34                                      | 190           |
| Kailash v. Girlja (1912) I. L. R. 39 Calc. 925                                                  | 425           |
| Kalam Sheikh v. Panchu Mandal (1869) 2 B. L. R. 252 ; 11 W. R. 128                              | 83            |
| Kalanand v. Sarafat (1908) 12 C. W. N. 528                                                      | 423           |
| Kalée Pershad v. Rajah Sahib Perhlad (1869) 12 M. I. A. 282                                     | 33            |
| Kali v. Trailokhya (1899) I. L. R. 26 Calc. 315                                                 | 369           |
| Kali Bux v. Ramgopal (1913) L. R. 41 I. A. 23 ; I. L. R. 36 All. 81 ; 19 C. L. J. 172           | 342, 539, 570 |
| Kalidas v. Kanalyaha Lal (1884) L. R. 11 I. A. 218 ; I. L. R. 11 Calc. 121                      | 432           |
| Kalidas v. Krishan (1869) 2 B. L. R. F. B. 103                                                  | 326           |
| Kali Doyal v. Nagendra Nath (1919) 24 C. W. N. 44                                               | 405           |
| Kali Krishna v. Secretary of State (1888) L. R. 15 I. A. 186 ; I. L. R. 16 Calc. 173            | 415           |
| Kalikanand v. Biprodas (1914) 24 C. L. J. 265                                                   | 422           |
| Kalipada v. Sekhar Basini (1916) 24 C. L. J. 235                                                | 490           |
| Kalka v. Basant (1901) L. L. R. 23 All. 36                                                      | 480           |
| Kally Churn Sahoo v. Secretary of State for India (1881) I. L. R. 6 Calc. 725                   | 139, 154, 306 |
| Kalu Mirza v. Emperor (1909) I. L. R. 37 Calc. 91                                               | 126           |
| Kamaruddin v. Jawahir Lal (1905) L. R. 32 I. A. 102 ; I. L. R. 27 All. 334 ; 1 C. L. J. 381     | 274           |
| Kameshwar Pershad v. Chairman Bhabua Municipality (1900) I. L. R. 27 Calc. 849                  | 286           |
| Kamini v. Krishna Chandra (1912) I. L. R. 39 Calc. 933                                          | 569           |
| Kanai Lal v. Kamini (1867) 1 B. L. R. 31 (O. C. J.) Footnote 343, 536, 568                      |               |
| Kandarpa Nag v. Banwari Lal Nag. (1920) 33 C. L. J. 224                                         | 159           |
| Kartick Chandra v. Nilmoni (1916) 20 C. W. N. 685                                               | 425           |
| Karuturi Gopalan v. Karuturi Venkataraghavalu (1915) I. L. R. 40 Mad. 632                       | 56            |
| Kasturi Singh v. Rajkumar (1904) 8 C. W. N. 876                                                 | 468           |
| Kasumunnissa v. Nilratna (1881) I. L. R. 8 Calc. 79                                             | 103           |
| Kewal v. Prabhu Lal (1917) L. R. 44 I. A. 159 ; I. L. R. 39 All. 496                            | 575           |
| Kazi Nawaz Khoda v. Ram Jadu Dey (1906) I. L. R. 34 Calc. 109 ; 5 C. L. J. 33                   | 277           |
| Kedar Nath Samanta v. Manu Bibi (1911) 16 C. W. N. 247                                          | 365           |
| Keramatulla v. Keramatulla (1918) 23 C. W. N. 118                                               | 331           |
| Keshawesarendra v. Rani Debendra Bala Dasi (1919) 4 Pat. L. J. 213 ; (1919) C. W. N. (Pat.) 121 | 298           |
| Keshub v. Bishnu Persaud (1860) Sev. 240                                                        | 327           |
| Keshub v. Radha Raman (1912) 27 C. W. N. 991                                                    | 530, 568      |
| Kessowji Issur v. G. I. P. Ry. (1907) L. R. 34 I. A. 115 ; I. L. R. 31 Bom. 381 ; 6 C. L. J. 5  | 110           |

|                                                                         |               |
|-------------------------------------------------------------------------|---------------|
| Khajooroonessa v. Rowshan (1876) L. R. 3 I. A. 291; I. L. R. 2 Calc.    |               |
| 184 ... ..                                                              | 445           |
| Khas Mehal v. Administrator-General (1901) 5 C. W. N. 505               | 568           |
| Khetter Mohan v. Pran Kristo (1899) 3 C. W. N. 371                      | 311           |
| Khirajmul v. Daim (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296;      |               |
| 1 C. L. J. 584 ... ..                                                   | 293           |
| Khub Lal v. Ajodhya (1915) I. L. R. 43 Calc. 574; 22 C. L. J. 345       | 337           |
| Khudiram v. Bonwari (1889) I. L. R. 16 Calc. 584                        | 539           |
| Khulna Loan Co. v. Jnanendra (1917) 22 C. W. N. 145                     | 168           |
| Khunnital v. Gobind (1911) L. R. 38 I. A. 87; I. L. R. 33 All. 356; 13  |               |
| C. L. J. 620 ... ..                                                     | 331, 547      |
| Khurshed v. Faiyaz (1914) I. L. R. 36 All. 289; 12 A. L. J. R. 487      | 454           |
| King v. Chuck (1853) 17 Beav. 325; 99 R. R. 169                         | 413           |
| Kishore Lal Dey v. The Administrator-General of Bengal (1898) 2 C.      |               |
| W. N. 303 ... ..                                                        | 369           |
| Kishori Lal v. Chuni Lal (1908) L. R. 36 I. A. 9; I. L. R. 31 All. 773; |               |
| 9 C. L. J. 172 ... ..                                                   | 111, 538, 570 |
| Kishori Mohan v. Manimohan (1908) I. L. R. 12 Calc. 165                 | 34            |
| Kishory Mohan v. Mahomed Mujaffar (1890) I. L. R. 18 Calc. 188          | 104           |
| Kissen v. Kally (1905) I. L. R. 33 Calc. 633                            | 364           |
| Kokla v. Piari Lal (1913) I. L. R. 35 All. 502                          | 331           |
| Koowar Singh v. Gour Sunder (1897) I. L. R. 24 Calc. 887...             | 487           |
| Krishna v. Sami (1884) I. L. R. 9 Mad. 64                               | 326           |
| Krishnappa Mudaly v. Periaswamy Mudaly (1916) I. L. R. 40 Mad. 964      | 480           |
| Krishnappa v. Shivappa (1907) I. L. R. 31 Bom. 393                      | 101           |
| Krishna Behari v. Brojeswar (1875) L. R. 2 I. A. 283                    | 167, 415      |
| Krishna Chandra v. Satish Chandra Banerji (1915) 20 C. W. N. 872        | 468           |
| Krishna Kisor De v. Nagendrabala (1921) 34 C. L. J. 333; 25 C. W. N.    |               |
| 942 ... ..                                                              | 568           |
| Kristo Kinkur v. Buroda Kanta (1872) 14 M. L. A. 65                     | 424           |
| Kulsom v. Golam (1905) 10 C. W. N. 449                                  | 454           |
| Kumara v. Srinivasa (1887) I. L. R. 11 Mad. 213                         | 347           |
| Kundal Lal v. Begamunnessa (1918) 22 C. W. N. 937                       | 136, 333, 530 |
| Kurali Prasad v. Anantaram (1871) 8 B. L. R. 490 (502) P. C.; 16 W. R.  |               |
| P. C. 16 ... ..                                                         | 382           |
| Kusodhaj v. Braja Mohan (1915) I. L. R. 43 Calc. 217                    | 270           |
| L.                                                                      |               |
| Labbi v. Bibbun (1874) 6 All. H. C. R. 159                              | 454           |
| Lachmi Narain v. Mazhar Abbas (1908) I. L. R. 35 Calc. 1000             | 430           |
| Lachmiput v. Amir Alum (1882) I. L. R. 9 Calc. 176                      | 448           |
| Lady Shelburne v. Lord Inchiquin (1784) 1 Br. Ch. Ca. 388               | 264           |
| Lakhi v. Bhairab (1833) 5 Sel. Rep. 315 (New Ed. 369)                   | 327           |
| Lakhi v. Hamid (1917) 27 C. L. J. 284                                   | 233           |
| Lakhi v. Mokar (1917) 27 C. L. J. 293                                   | 233           |

|                                                                                                                | PAGE.        |
|----------------------------------------------------------------------------------------------------------------|--------------|
| Lakshimoni v. Nittyananda (1892) I. L. R. 20 Calc. 464 ...                                                     | 436          |
| Lakshmana v. Lakshmi (1881) I. L. R. 4 Mad. 160 ...                                                            | 329          |
| Lakshman v. Radhabai (1887) I. L. R. 11 Bom. 609 ...                                                           | 329          |
| Lakshmi v. Tara Prasanna (1904) I. L. R. 31 Calc. 944 ; 8 C. W. N. 710 ...                                     | 315          |
| Lakshmi Chand v. Kachubhai (1911) I. L. R. 35 Bom. 393...                                                      | 410          |
| Lal Gopal Dutt v. Manmatha Lal Dutt (1904) I. L. R. 32 Calc. 258 ...                                           | 371          |
| Laljee Mahomed v. Guzdar (1915) I. L. R. 43 Calc. 833 ; 23 C. L. J. 190 ...                                    | 380, 396     |
| Lal Koer v. Chiranji Lal (1909) L. R. 37 I. A. 1, I. L. R. 32 All. 104 ; 14 C. W. N. 285 ; 11 C. L. J. 172 ... | 112          |
| Lalla Gopee v. Liakut (1876) 25 W. R. 211 ...                                                                  | 432          |
| Lalli v. Ram Prasad (1886) I. L. R. 9 All. 74 ...                                                              | 372          |
| Lal Mahammad v. Shakuran (1913) 18 I. C. 867 ...                                                               | 282          |
| Lancashire Telephone Co. v. Manchester (1884) 14 Q. B. D. 267 ...                                              | 289          |
| Landon v. Morris (1832) 2 L. J. Ch. 35 ; 5 Sim 247 ...                                                         | 102          |
| Latchemy v. Lewcock (1800) 1 Strange N. C. 26 ...                                                              | 343, 537 569 |
| Lawrence v. Norreys (1890) 15 A. C. 210 ...                                                                    | 551          |
| Lawson v. Wallasey Local Board (1883) 11 Q. B. D. 229 ...                                                      | 177          |
| Lawton v. Campion (1854) 18 Beav. 87 ...                                                                       | 550          |
| Leigh v. Dickeson (1884) 15 Q. B. D. 60 ...                                                                    | 443          |
| Leigh v. Jack (1879) 5 Ex. Div. 264 ...                                                                        | 474          |
| Lemmon v. Webb (1895) App. Cas. 1 ...                                                                          | 316          |
| Lemmon v. Webb (1894) 3 Ch. 1 ...                                                                              | 316          |
| Lewis v. Hillman (1852) 3 H. L. C. 607 ...                                                                     | 89           |
| Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 ...                                                     | 422          |
| Lokenath v. Achitananda (1915) 15 C. L. J. 391 ...                                                             | 256          |
| Lokenath Singh v. Dhakeswar Prosad (1914) 21 C. L. J. 253 ; 20 C. W. N. 51 ...                                 | 440          |
| London and N. N. Railway Company v. Buckmaster (1874) L. R. 10 Q. B. 70 ...                                    | 289          |
| Lopez v. Muddun Mohan Thakur (1870) 13 M. I. A. 467 ...                                                        | 232          |
| Loresy v. Smith (1880) 15 Ch. D 655 ...                                                                        | 267          |
| Luchmun v. Kishun (1882) I. L. R. 8 Calc. 218 ...                                                              | 424          |
| Lucy's case (1853) 4 DeG M. & G. 356 ; 102 R. R. 163 ...                                                       | 549          |

M.

|                                                                               |          |
|-------------------------------------------------------------------------------|----------|
| Ma Shwe & Mya v. Maung Mo (1921) decided on the 28th January by the P. C. ... | 552      |
| Mackenzie v. Coulson (1869) L. R. 8 Eq. 368 ...                               | 264      |
| Macpherson v. Watt (1877) 3 A. C. 254 ...                                     | 89       |
| Madhu Sudan v. Debendra Nath (1908) 7 C. L. J. 23 S. N. ; 34 C. L. J. 76 ...  | 84       |
| Mahabir Prasad v. Taj Begam (1914) 19 C. W. N. 162 P. C. ...                  | 538, 570 |

|                                                                                               | PAGE.         |
|-----------------------------------------------------------------------------------------------|---------------|
| Mahadevi v. Neelamani (1896) I. L. R. 20 Mad. 269 ...                                         | 538, 570      |
| Magniram v. Laxminarayan (1908) I. L. R. 32 Bom. 353 ...                                      | 412           |
| Mahamaya v. Haridas (1914) I. L. R. 42 Calc. 455 ; 19 C. W. N. 208 ;<br>20 C. L. J. 183 ...   | 319           |
| Maharaja of Burdwan v. Tarasundari (1882) L. R. 10 I. A. 19 ; I. L. R.<br>19 Calc. 619 ...    | 400           |
| Maharaja of Darbhanga v. Homeswar (1920) L. R. 48 I. A. 17 ; 33 C.<br>L. J. 109 ...           | 274           |
| Maharani of Burdwan v. Krishna Kamini (1886) L. R. 14 I. A. 50 ; I.<br>L. R. 14 Calc. 365 ... | 404           |
| Maheshar Baksh v. Ratan (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc.<br>766 ...               | 337           |
| Mahomed v. Kisori (1895) L. R. 22 I. A. 129 ; I. L. R. 22 Calc. 909 ...                       | 104           |
| Mahomed Sheikh v. Shamsur Ali (1879) 4 C. L. R. 165 ...                                       | 248           |
| Mahomed Ali, Nawab v. Chairman of Behar Municipality (1920) 1 Pat.<br>L. T. 591 ...           | 287           |
| Mahomed Bux v. Hosseini (1888) L. R. 15 I. A. 81 ; I. L. R. 15 Calc.<br>684 ...               | 344, 537, 569 |
| Makund Singh v. Saraswati Bfbi (1912) 29 C. L. J. 245 ...                                     | 420           |
| Malladi v. Brundavanam (1911) 2 Mad. W. N. 258 ...                                            | 429           |
| Malraju v. Venkatadri (1920) 40 M. L. J. 144 ...                                              | 181, 551      |
| Manohar v. Bhagabati (1867) 1 B. L. R. O C. J. 28 ...                                         | 536, 568      |
| Manohar v. Sumitra (1895) I. L. R. 17 All. 428 ...                                            | 337           |
| Mantappa v. Paswant (1871) 14 M. L. A. 24 ...                                                 | 549           |
| Marckham v. Gonaston (1598) Croke Elig. 626 ...                                               | 347           |
| Mariam Bibi v. Ibrahim (1916) 28 C. L. J. 306 ...                                             | 334, 529, 563 |
| Mariamnissa Bibi v. Joynab Bibi (1906) I. L. R. 33 Calc. 1101 ; 4 C. L.<br>J. 149 ...         | 282           |
| Marquis of Townshed v. Stangroom (1801) 6 Ves. 334 ...                                        | 264           |
| Mashud Hasan v. Anwar Husain (1909) 6 All. L. J. R. 503 ...                                   | 454           |
| Mati v. Pree (1908) 9 C. L. J. 96 ; 13 C. W. N. 226 ...                                       | 79 101        |
| Mati Lal v. Eastern Mortgage Agency Co. (1920) L. R. 47 I. A. 265<br>25 C. W. N. 265 ...      | 538, 571      |
| Matra Mandal v. Hari (1889) I L R. 17 Calc. 155 ...                                           | 96            |
| Matru Mal v. Durga Kumar (1919) L. R. 47 I. A. 71 ; 32 C. L. J. 121 ...                       | 271           |
| Matson v. Trower (1824) Ry & Mo. 17 ...                                                       | 47            |
| Maynard v. Eaton (1874) L. R. 9 Ch. 414 ; 43 L. J. Ch. 641 ...                                | 550           |
| Mayor of Tynemouth v. Duke of New Castle (1903) 89 L. T. 557 ;<br>19 T. L. R. 630 ...         | 191           |
| Mc. Ilwrath v. Hollander (1880) 73 Missouri 105 ; 39 Am. Rep. 485 ...                         | 103           |
| Mc. Kellar v. Wallace (1853) 5 M. L. A. 372 ; 8 M. P. C. 378 ...                              | 406           |
| Mediseti v. Kunchala (1917) 23 M. L. T. 306 ...                                               | 489           |
| Mehdi Hossein v. Umes Chandra (1917) I. L. R. 45 Calc. 685 ; 27<br>C. L. J. 494 ...           | 278           |
| Mehal v. Administrator General (1901) 5 C. W. N. 505 ...                                      | 53            |

|                                                                                                              | PAGE.           |
|--------------------------------------------------------------------------------------------------------------|-----------------|
| Mellersh v. Keen (1859) 27 Beav 236 ... ..                                                                   | 646             |
| Mewa v. Hulas (1874) L. R. 1 I. A. 157 ; 13 B. L. R. 312 ... ..                                              | 540             |
| Midnapur Zemindari Co. v. Kumar Naresh Narain (1921) 33 C. L. J. 497 ... ..                                  | 137             |
| Midnapur Zemindary Co. Ltd. v. Nityakali Dasi (1914) 24 I. C. 243                                            | 282             |
| Miller v. Madho Das (1896) L. R. 23 I. A. 106 ; I. L. R. 19 All. 76 ... ..                                   | 107             |
| Mills v. Brooker (1919) 1 K. B. 555 ... ..                                                                   | 317             |
| Mina Kumari v. Bijoy (1916) L. R. 44 I. A. 72 ; I. L. R. 44 Calc. 662 ; 25 C. L. J. 508 ... ..               | 107,257,303,335 |
| Mahamed v. Yesh (1916) L. R. 43 I. A. 256 ; (1916) A. C. 575 ...                                             | 307             |
| Mohammed Ali v. Ramzan Ali (1920) 24 C. W. N. 977 P. C. ...                                                  | 538, 570        |
| Mohan v. Har Prosad (1917) 40 I. G. 2 ... ..                                                                 | 297             |
| Mohesh v. Radha Kishore (1907) 12 C. W. N. 28 ; 6 C. L. J. 580 ...                                           | 412             |
| Mohidin v. Shivlingappa (1899) I. L. R. 23 Bom. 666 ... ..                                                   | 322             |
| Mohini v. Bungsi (1889) I. L. R. 17 Calc. 580 ... ..                                                         | 469             |
| Mohini v. Promode (1896) I. L. R. 24 Calc. 256 ... ..                                                        | 467             |
| Mohini v. Pyari Lal (1916) 25 C. L. J. 99 ... ..                                                             | 423             |
| Mohumud Zahoor v. Rutta koer (1867) 11 M. I. A. 468 ; 9 W. R. P. C. 9 ... ..                                 | 531             |
| Mokund Lall v. Chotay Lall (1884) I. L. R. 10 Calc. 1061 ... ..                                              | 366             |
| Monindra v. Ram Krishna (1915) 21 C. L. J. 621 ... ..                                                        | 307             |
| Monmohan v. Bidhu Bhusan (1918) 28 C. L. J. 268 ... ..                                                       | 411             |
| Monmohini v. Robert Watson & Co. (1899) 4 C. W. N. 113 P. C. ; I. L. R. 27 Calc. 336 ... ..                  | 472             |
| Mon Mohun v. Secretary of State (1890) I. L. R. 17 Calc. 968 ...                                             | 419             |
| Monohar v. Peary (1919) 30 C. L. J. 177 ... ..                                                               | 87              |
| Monohur v. Hurryhur (1879) 3 Shome 23 ... ..                                                                 | 101             |
| Morgan v. Dodge (1862) 44 New Hampshire 255 ; 82 Am. Dec. 213                                                | 460             |
| Moro v. Balaji (1894) I. L. R. 19 Bom. 809 ... ..                                                            | 329             |
| Moxun v. Payne (1873) L. R. 8 Ch. App. 881 ; 43 L. J. Ch. 240 ...                                            | 530             |
| Mozuffur Ali v. Grish Chunder (1868) 10 W. R. 71 ; 1 B. L. R. A. C. 25                                       | 469             |
| Mugun v. Surbessor (1867) 8 W. R. 479 ... ..                                                                 | 416             |
| Mugnirani v. Gursahai (1889) I. L. R. 17 Calc. 347 ; L. R. 16 I. A. 195                                      | 494             |
| Muhammad Gulshere v. Mariam Begum (1881) I. L. R. 3 All. 731 ...                                             | 454             |
| Muhammad Kamil v. Imtiaz Fatima (1908-9) L. R. 36 I. A. 210 ; I. L. R. 31 All. 557 ; 10 C. L. J. 297. ... .. | 538, 570        |
| Muhammad Mahbub Ali v. Bharatindu (1918) 23 C. W. N. 321 ...                                                 | 257, 339        |
| Muhammad Sulaiman v. Fatima (1889) I. L. R. 11 All. 314 ... ..                                               | 425             |
| Muhammad Sulaiman v. Muhammad Yar Khan (1888) I. L. R. 11 All. 267 F. B. ... ..                              | 424             |
| Muhammad Suleman Khan v. Muhammad Yar Khan (1894) I. L. R. 17 All. 39 ... ..                                 | 398             |
| Mulla v. Subramania (1916) 34 M. L. J. 431 ... ..                                                            | 452             |

|                                                                         |          |
|-------------------------------------------------------------------------|----------|
| Mungul Pershad v. Girija Kant (1881) L. R. 8 I. A. 123 ; I. L. R. 8     |          |
| Calc. 51                                                                | 167, 419 |
| Murti v. Bhola Ram (1893) I. L. R. 16 All. 165                          | 471      |
| Musahar Sahu v. Hakim Lal (1915) L. R. 43 I. A. 104 ; I. L. R. 43 Calc. |          |
| 521 ; 23 C. L. J. 406                                                   | 108      |
| Muttu v. Bristo (1918) App. Cas. 895                                    | 440      |
| Muthu v. Orr (1910-11) I. L. R. 35 Mad. 618                             | 140      |
| Muthukana v. Vada (1909-10) I. L. R. 34 Mad. 12                         | 450      |
| Myers v. Sarl (1860) 3 E and E 306 ; 122 R. R. 710                      | 162      |
| Mylapur v. Yeo Kay (1887) L. R. 11 I. A. 168 ; I. E. R. 14 Calc. 801    | 551      |

## N.

|                                                                        |               |
|------------------------------------------------------------------------|---------------|
| Naduroonissa v. Ahgur Ali (1867) 7 W. R. 103                           | 101           |
| Nagendra Lal Chowdhury v. Nazir Ali (1906) 10 C. W. N. 503             | 486           |
| Nagindas Bhugvandas v. Bachoo Hur Krisandas (1905) L. R. 43 I. A.      |               |
| 56 ; I. L. R. 40 Bom. 270 ; 23 C. L. J. 395                            | 58            |
| Naicker v. Midnapur Zemindary Company (1921) 34 C. L. J. 5             | 27            |
| Nanchand v. Virthu (1894) I. L. R. 19 Bom. 258                         | 426           |
| Nanda Kumar v. Bilasram (1917) 3 Pat. L. J. 115 ; (1917) Pat. C. W. N. |               |
| 377                                                                    | 424           |
| Naraguntty Luchmedavamah v. Vengama Naido (1861) 9 M. I. A. 66         | 11            |
| Narain v. Manofi (1890) I. L. R. 17 Calc. 489 F. B.                    | 580           |
| Narasinha v. Veerabhadra (1893) I. L. R. 17 Mad. 287                   | 326           |
| Narayan v. Sono. (1899) I. L. R. 24 Bom. 149                           | 419           |
| Narayan v. Umbar (1911) I. L. R. 35 Bom. 275                           | 341           |
| Narayana v. Chengalamma (1886) I. L. R. 10 Mad. 1                      | 18            |
| Narayan v. Chulhan (1911) 15 C. L. J. 376                              | 443           |
| Narendra v. Jogendra (1914) 20 C. L. J. 469                            | 297, 310      |
| Narendra Bhusan Ray v. Jogendra Nath Ray (1916) 20 C. W. N. 1238       | 440           |
| Narsingh Narain v. Sheikh Jahi Mistry (1911) 15 C. L. J. 3             | 297, 311      |
| Narsummal v. Lutchmana (1809) 1 Strange N. C. 312                      | 343, 537, 569 |
| Nawab v. Bhagwan (1882) I. L. R. 4 All. 427                            | 326           |
| Nawab Bahadur v. Gopi Nath (1910) 13 C. L. J. 625                      | 471           |
| Nawab Begam v. A. H. Creet (1905) I. L. R. 27 All. 678                 | 366           |
| Nazar v. Rafee (1911) 8 A. L. J. R. 1154                               | 454           |
| Neale v. Mackenzie (1836) 1 M and W. 447 ; 46 R. R. 478                | 79            |
| Nellayadivu v. Subramaniya (1916) 31 M. L. J. 269                      | 314           |
| Net Lal v. Kareem Bux (1896) I. L. R. 23 Calc. 686                     | 308           |
| Nibaran Chandra v. Ram Chandra (1917) 22 C. W. N. 444                  | 499           |
| Nicholas v. Asphar (1896) I. L. R. 24 Calc. 216                        | 102           |
| Nidhi Lal v. Mazahar (1884) I. L. R. 7 All. 230                        | 96            |
| Nilmani v. Mathura (1900) 5 C. L. J. 413                               | 246           |
| Nilambar Ghosh v. Mir Mahasanuddin (1914) 34 C. L. J. 77               | 84            |
| Nisar Ali v. Ali Ali (1905) I. L. R. 28 All. 133                       | 493           |
| Nistarini v. Nundo Lal (1899) I. L. R. 26 Calc. 891                    | 537, 568      |

|                                                                                              | PAGE.        |
|----------------------------------------------------------------------------------------------|--------------|
| • Nitayi Behari v. Hari Govinda (1899) I. L. R. 26 Calc. 677                                 | ... 312      |
| Nobin v. Rassick (1884) I. L. R. 10 Calc. 1047                                               | ... 374      |
| Nobo Coomar v. Gobind Chunder (1881) 9 C. L. R. 305                                          | ... 472      |
| Noor Ali v. Koni Meah (1886) I. L. R. 13 Calc. 13                                            | ... 426      |
| Norris v. Baker (1613) 1 Rolle 394; Bridg. 47 <i>sub nomine</i> Morice v. Baker 3 Bluist 196 | ... 316      |
| Norris v. Ile (1894) 152 Ill. 190; 43 A.M. St. Rep. 233                                      | ... 103      |
| Nubeen v. Stephenson (1871) 15 W. R. 534                                                     | ... 476      |
| Nugent v. Nugent (1908) 1 Ch. 546; (1907) 2 Ch. 292                                          | ... 87, 89   |
| O.                                                                                           |              |
| Odium v. City of Vancouver (1915) 85 L. J. P. C. 95                                          | ... 192      |
| Offley v. Best (1643) 1 Sid. 370                                                             | ... 459      |
| Omrita Lall v. Kalee Pershad (1876) 25 W. R. 179                                             | ... 472      |
| Oodoy Singh v. Paluck Singh (1871) 16 W. R. 271                                              | ... 468      |
| Oodayanasamy Tevar v. Alagappa Chetty (1903) 14 M. L. J. 342                                 | ... 297      |
| Oriental Bank Corp. v. Fleming (1879) I. L. R. 3 Bom. 242                                    | ... 576      |
| Oriental G. S. L. A. Co. v. Narasinha (1901) I. L. R. 25 Mad. 183                            | ... 307      |
| Origanti v. Desikachari (1919) 36 M. L. J. 461                                               | ... 354      |
| Ossalinsky v. Corporation of Manchester (1883) 2 Hudson on compensation 1546                 | ... 191      |
| P.                                                                                           |              |
| Paget v. Paget (1687) 2 Rep. Ch. 410                                                         | ... 348      |
| Palmer v. Wick (1894) App. Cas. 318                                                          | ... 422      |
| Panchananda Velan v. Vaithinatha Sastrial (1905) I. L. R. 29 Mad. 333                        | ... 282      |
| Panchi Dasi v. Bala Das (1909) 11 C. L. J. 98; 13 C. W. N. 1025                              | ... 238      |
| Pannalal v. Bamasundari (1871) 6 B. L. R. 732                                                | ... 536, 568 |
| Parker v. Tarpin (1918) 1 K. B. 358                                                          | ... 178      |
| Parkin v. Moon (1836) 7 C. & P. 408                                                          | ... 112      |
| Parmeshwar v. Gobind (1915) I. L. R. 43 Calc. 459                                            | ... 577      |
| Parsons v. Hayward (1862) 4 DeG. F. & J. 474; 135 R. R. 49                                   | ... 406      |
| Parsotam v. Chedda Lal (1906) I. L. R. 29 All. 76                                            | ... 275      |
| Patridge v. Shephard (1886) 71 Cal. 470; 13 Pacific 480                                      | ... 101      |
| Paterson & Son v. Corporation of Glasgow (1901) 3 F. 34; 38 Scots L. R. 855                  | ... 39       |
| Patroji v. Ganu (1890) I. L. R. 15 Bom. 370                                                  | ... 425      |
| Pattu Lal v. Barbat Kunwar (1915) L. R. 42 I. A. 155; I. L. R. 37 All. 359; 22 C. L. J. 190  | ... 59       |
| Payana v. Pana Lana (1913) L. R. 41 I. A. 142                                                | ... 470      |
| Pearylall v. Banamali (1911) 22 C. L. J. 40                                                  | ... 493      |
| Peari Mohan, Raja v. Arunoday (1920) 25 C. W. N. 168                                         | ... 462      |
| Peari Mohan v. Narendra (1909) L. R. 37 I. A. 27; I. L. R. 37 Calc. 229; 11 C. L. J. 220     | ... 87       |
| Peruvian Guano Co. v. Dreyfus (1892) App. Cas. 166                                           | ... 421      |



|                                                                                                | PAGE. |
|------------------------------------------------------------------------------------------------|-------|
| Phooddee Bibee v. Gobind Chunder Roy (1874) 22 W. R. 272                                       | 382   |
| Pigot's Case (1614) 11 Coke Rep. 226 (272)                                                     | 348   |
| Pingala Lakshmi pathi v. Bonimi Reddipalli Chalamayya (F.B.) (1907)                            |       |
| I. L. R. 30 Mad. 434                                                                           | 16    |
| Pipon v. Wallis (1753) 1 Lee 402                                                               | 460   |
| Piriaroyalu v. Royalu (1894) I. L. R. 18 Mad. 434                                              | 473   |
| Pitts v. Lafontaine (1880) 6 App. Cas. 482                                                     | 424   |
| Plowright v. Lambert (1885) 52 L. T. 646                                                       | 88    |
| Pokpal v. Chhiddu (1912) 9 A. L. J. 653                                                        | 298   |
| Pollock v. Heatley (1910) 47 Scots. L. R. 402                                                  | 50    |
| Poorendra v. Hemangini (1885) I. L. R. 26 Calc. 75                                             | 34    |
| Poresch Moni v. Nobo Kishore (1903) 8 C. W. N. 193, I. L. R. 30 Calc. 773                      | 584   |
| Prokateni v. Koram (1912) Mad. W. N. 532                                                       | 331   |
| Pranal Annee v. Lukshmi Annee (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508                  | 105   |
| Prasanna v. Jnanendra (1915) I. L. R. 43 Calc. 779                                             | 423   |
| Prasanna Kumar v. Srinath Dass (1887) I. L. R. 15 Calc. 231                                    | 583   |
| Pratab Singh v. Bhabuti Singh (1913) L. R. 40 I. A. 182; I. L. R. 35 All. 487; 18 C. L. J. 384 | 297   |
| Premchand v. Collector of Calcutta (1876, I. L. R. 2 Calc. 103                                 | 188   |
| Preston Banking Co. v. Allsop (1895) 1 Ch. 141                                                 | 273   |
| Price v. Mannng (1889) 42 Ch. D. 373                                                           | 112   |
| Profulla v. Salimulla (1918) 23 C. W. N. 590                                                   | 312   |
| Promotho Nath v. Dinamoni (1907) 34 C. L. J. 129                                               | 156   |
| Promotha Nath v. Jagannath Kisore (1912) 17 C. L. J. 427                                       | 82    |
| Protab v. Judisthir (1914) 19 C. L. J. 408                                                     | 133   |
| Pulin Behary v. King Emperor (1912) 15 C. L. J. 517                                            | 381   |
| Purno Chandra v. Bejoy Chahd (1913) 18 C. L. J. 18                                             | 297   |
| Pyer v. Carter (1857) 1 H. & N. 916                                                            | 522   |
| Q.                                                                                             |       |
| Queen v. St. Pancras Assessment Committee (1877) 2 Q. B. D.                                    | 288   |
| R.                                                                                             |       |
| R. v. Balt (1839) 8 C. & P. 745                                                                | 111   |
| R. v. Bertrand (1867) L. R. 1 P. C. 520                                                        | 380   |
| R. v. Brown (1867) L. R. 2 Q. B. 630; 36 L. J. Q. B. 322                                       | 191   |
| R. v. Newstead (1769) Burr. 669                                                                | 162   |
| R. v. Plumber (1902) 2 K. B. 339                                                               | 379   |
| R. v. Silverlock (1894) 2 Q. B. 766                                                            | 382   |
| R. v. St. George's Union (1871) L. R. 7 Q. B. 90                                               | 289   |
| R. v. Swyer (1836) 10 Band C 486                                                               | 162   |
| R. S. N. Co. v. Hathor S Co (1916) 20 C. W. N. 1023                                            | 183   |
| R. V. Srinivasa Iyengar v. S. K. M. R. M. Ramaswami Chettiar (1913-1915) I. L. R. 39 Mad. 235  | 493   |

|                                                                                                |               |
|------------------------------------------------------------------------------------------------|---------------|
| Radha Charan Chandra v. Maharaja Ranjit Singh (1917) 27 C. L. J. 532 ... ..                    | 279           |
| Radha Jeebun v. Taramonee (1869) 12 M. I. A. 380; 2 B. L. R. 79 P. C. 11 W. R. P. C. 31 ... .. | 111           |
| Radha Mohun v. Jadoomonee (1875) 23 W. R. 369 ... ..                                           | 551           |
| Radhamoni v. Collector of Khulna (1900) L. R. 27 I. A. 136; I. L. R. 27 Calc. 943 ... ..       | 133, 154, 472 |
| Radharaman v. Surnamoyi (1903) I. L. R. 30 Calc. 506 ... ..                                    | 430           |
| Radhashyam v. Rangasundari (1920) 24 C. W. N. 541 ... ..                                       | 297           |
| Raghabanund v. Sadhu Charan (1878) I L. R. 4 Calc. 425 ... ..                                  | 60            |
| Raghubar v. Bhikya (1885) I. L. R. 12 Calc. 69 ... ..                                          | 311           |
| Raghunadha v. Brozo Kishore (1876) L. R. 3 I. A. 154 ... ..                                    | 329           |
| Rahimbhoy v. Turner (1892) I. L. R. 17 Bom. 341; L. R. 20 I. A. 1 ... ..                       | 564           |
| Rahim Jan v. Iman Jan (1911) 17 C. L. J. 173 ... ..                                            | 337           |
| Rahimuddin v. Loll Meah (1902) I L. R. 29 Calc. 696 ... ..                                     | 480           |
| Rahimuddin v. Nalini (1909) 13 C. W. N. 407 ... ..                                             | 423           |
| Rainbow v. Kittoe (1916) 1 Ch. 316 ... ..                                                      | 460           |
| Raja v. Subbaraya (1883) I. L. R. 7 Mad. 253 ... ..                                            | 56            |
| Raja of Pitapur v. Suriya Rao (1885) L. R. 12 I. A. 116; I. L. R. 8 Mad. 520 ... ..            | 466           |
| Raja of Ramnad v. Velusami (1920) L. R. 48 I. A. 45; 33 C. L. J. 218 ... ..                    | 167           |
| Raja Rajeswara Sethupati v. Velusami (1920) 25 C. W. N. 581 P. C. ... ..                       | 420           |
| Rajah Sahib Perhlad v. Rajender Kishore (1869) 12 M. I. A. 292 ... ..                          | 468           |
| Rajani v. Panchananda (1918) 23 C. W. N. 290 ... ..                                            | 498           |
| Raj Chunder v. Shaikh Busbeer (1875) 24 W. R. 476 ... ..                                       | 485           |
| Raj Chunder v. Gangadas (1904) I. L. R. 31 Calc. 487 ... ..                                    | 405           |
| Rajendro v. Jogendro (1871) 14 M. I. A. 67; 7 B. L. R. 16; 15 W. R. P. C. 39 ... ..            | 382, 432      |
| Rajendra v. Nibaran (1919) 25 C. W. N. 859 ... ..                                              | 331           |
| Rajendra Nath v. Secretary of State (1904) I. L. R. 32 Calc. 343 ... ..                        | 191           |
| Raj Kishen v. Radha Madhub (1874) 21 W. R. 349 ... ..                                          | 101           |
| Raj Kumar Lal v. Bulaki (1917) 3 Pat. L. W. 146 ... ..                                         | 477           |
| Raj Kumar v. Probal (1904) 9 C. W. N. 656 ... ..                                               | 78, 79        |
| Rajlakshi v. Katyayani (1910) I. L. R. 38 Calc. 639 ... ..                                     | 102           |
| Rajnarain v. Ananta (1892) I L. R. 19 Calc. 703 ... ..                                         | 404           |
| Ramachari v. Duraisami (1897-8) I. L. R. 21 Mad. 167 ... ..                                    | 308           |
| Ramakrishna v. Tripurabai (1908) I. L. R. 33 Bom. 88 ... ..                                    | 329           |
| Ramanath v. Kusum Kamini (1906) 4 C. L. J. 56 ... ..                                           | 575           |
| Ramaswami v. Rameswaramma (1899-1900) I. L. R. 23 Mad. 361 ... ..                              | 480           |
| Ramayya v. Jagannadban (1915) I L. R. 39 Mad. 930 ... ..                                       | 17            |
| Ram Anant v. Shankar Singh (1908) I. L. R. 30 All. 369 ... ..                                  | 84            |
| Ram Asray Singh v. Sheo Nandan Singh (1916) 1 Pat. L. J. 573 ... ..                            | 298           |
| Ramchandra v. Jogeswar (1893) I. L. R. 29 Calc. 758 ... ..                                     | 307           |
| Ramchandra v. Ranjit (1859) I. L. R. 27 Calc. 242 ... ..                                       | 436           |

|                                                                            |               |
|----------------------------------------------------------------------------|---------------|
| Ramchandra v. Secretary of State (1916) L. R. 43 I. A. 172 ; I. L. R. 43   |               |
| Calc. 1104 ; 24 C. L. J. 296 ... ..                                        | 319           |
| Ramcharan v. Lakhi Kant (1871) 7 B. L. R. 704 F. B. ; 16 W. R. 1           |               |
| F. B. ... ..                                                               | 416           |
| Ram Dass v. Stephenson (1868) 10 W. R. 366 ... ..                          | 476           |
| Ramesh Chandra v. Rajani Kanta (1893) L. R. 20 I. A. 95 ; I. L. R. 21      |               |
| Calc. 1. P. C. ... ..                                                      | 382           |
| Rameswar v. Bhaba Sundari (1909) 11 C. L. J. 81 ... ..                     | 425           |
| Ram Kanai v. Fakir Chand (1904) 8 C. W. N. 438 ... ..                      | 84            |
| Ram Kirpal v. Rup Kuari (1883) L. R. 11 I. A. 37 ; I. L. R. 6 All. 269 ... | 167           |
| Ram Krishna v. Tripurabai (1911) 13 Bom. L. R. 940 ... ..                  | 329           |
| Ramlochan v. Munsoor (1869) 11 W. R. 339 ... ..                            | 419           |
| Ram Manickya v. Juggunnath (1879) I. L. R. 5 Calc. 563 ... ..              | 419           |
| Ram Mohan v. Badan (1903) 8 C. W. N. 436 ... ..                            | 580           |
| Ram Pershad v. Jaggannath (1904) I. L. R. 30 Calc. 134 ... ..              | 480           |
| Ram Pershad v. Rane Phoolputtee (1867) 7 W. R. 98 ... ..                   | 343, 536, 568 |
| Ramratan v. Aswini Kumar (1910) I. L. R. 37 Calc. 559 ; 11 C. L. J.        |               |
| 503 ... ..                                                                 | 422           |
| Ramswami v. Sundara (1907) I. L. R. 31 Mad. 28 ... ..                      | 426           |
| Ramzan v. Zahur (1913) 18 I. C. 240 ... ..                                 | 444           |
| Rangasami v. Nachiappa (1918) L. R. 46 I. A. 72 ... ..                     | 548           |
| Ranjit v. Katesar (1896) I. L. R. 18 All. 390 ... ..                       | 469           |
| Ranjit Singh Bahadur v. Maharaj Bahadur Singh (1918) I. L. R. 46           |               |
| Calc. 173 ; 29 C. L. J. 193 ... ..                                         | 278           |
| Rashid v. Sherbanoo (1907) I. L. R. 31 Bom. 264 ... ..                     | 454           |
| Rashidunnissa v. Muhammad Ismail Khan (1909) L. R. 36 I. A. 168 ;          |               |
| I. L. R. 31 All. 572 ; 10 C. L. J. 318 ... ..                              | 297           |
| Ray v. Hazeldine (1904) 2 Ch. 17 ... ..                                    | 523           |
| Re Batten (1889) 22 Q. B. D. 685 ... ..                                    | 348           |
| Re Benzan (1914) 2 Ch. 68 ... ..                                           | 170           |
| Re Crosely (1887) 35 Ch. D. 266 ... ..                                     | 170           |
| Re Cullwick (1918) 11 K. B. 646 ... ..                                     | 170           |
| Re Rendall (1901) 1 Ch. 230 ... ..                                         | 460           |
| Re Stock (1896) 3 Manson 324 ; 66 L. J. Q. B. 146 ... ..                   | 170           |
| Re Tidswell (1863) 33 Beav. 213 ; 140 R. R. 94 ... ..                      | 49            |
| Re Wenham (1900) 2 Q. B. 698 ... ..                                        | 410           |
| Redgrave v. Hurd (1881) 20 Ch. D. 1 ... ..                                 | 550           |
| Reg v. Harvey (1869) 11 Cox C. C. 546 ... ..                               | 382           |
| Rex v. Holden (1912) 1 K. B. 487 ... ..                                    | 410           |
| Richards v. Rose (1853) 9 Ex. 218 ... ..                                   | 518           |
| Riddal v. New Castle Watter Co. (1879) Browne and Allen on compen-         |               |
| sation 678 ... ..                                                          | 191           |
| Ripley v. G. N. Ry. Co. (1875) L. R. 10 Ch. App. 435 ... ..                | 91            |
| Robinson v. Dulech Singh (1878) 11 Ch. D. 798 ... ..                       | 420           |
| Robson v. Rocke (1824) 2 Add. 53... ..                                     | 383           |

|                                                                                                               | PAGE.              |
|---------------------------------------------------------------------------------------------------------------|--------------------|
| Rogerson <i>v.</i> Rogerson (1885) 12 Rettie 583 ; 22 Scots L. R. 376                                         | 50                 |
| Roop Narain <i>v.</i> Gugadbur (1868) 9 W. R. 297                                                             | 343, 536, 568      |
| Rukhun, Bihee <i>v.</i> Shaikh Ahmed (1874) 22 W. R. 443                                                      | 537, 568           |
| Rungama <i>v.</i> Atchuma (1846) 4 M. I. A. 1                                                                 | 58                 |
| Rup Chand <i>v.</i> Shamshul Jehan (1889) I. L. R. 11 All. 346                                                | 425                |
| Rupnarain <i>v.</i> Gopal (1909) L. R. 36 I. A. 103 ; I. L. R. 36 Calc. 780 ; 10 C. L. J. 58                  | 437                |
| S.                                                                                                            |                    |
| S. C. Juscurn <i>v.</i> Plrthichand I. L. R. 46 Calc. 670                                                     | 425                |
| Sabo <i>v.</i> Nuboghun (1869) 11 W. R. 380                                                                   | 437                |
| Sadho Misser <i>v.</i> Golab Singh (1897) 3 C. W. N. 375                                                      | 270                |
| Sadler <i>v.</i> Whiteman (1910) 1 K. B. 868                                                                  | 410                |
| Sagrani <i>v.</i> Durga (1913) L. R. 41 I. A. 76 ; I. L. R. 36 All. 93 ; 19 C. L. J. 165                      | 384                |
| Sajjad <i>v.</i> Wasir (1912) L. R. 39 I. A. 156 ; I. L. R. 34 All. 455 ; 16 C. L. J. 613                     | 344, 538, 571      |
| Sakhalchand <i>v.</i> Velchand (1893) I. L. R. 18 Bom. 203                                                    | 426                |
| Salimullah <i>v.</i> Kaliprosonno (1915) 22 C. L. J. 569                                                      | 36                 |
| Samsul <i>v.</i> Sebakram (1874) L. R. 2 I. A. 7 ; 22 W. R. 40 ; 14 B. L. R. 226                              | 105                |
| Sarabai <i>v.</i> Rabibai (1905) I. L. R. 30 Bom. 537                                                         | 454, 525           |
| Sarada <i>v.</i> Akhil (1917) 28 C. L. J. 18 ; 21 C. W. N. 903                                                | 140                |
| Saramma <i>v.</i> Seshayya (1905) I. L. R. 28 Mad. 396                                                        | 308                |
| Sarat Chandra Roy Chowdhury <i>v.</i> Asiman Bibi (1904) I. L. R. 31 Calc. 725                                | 249                |
| Sartaj Kuai's case (1888) L. R. 15 I. A. 51 ; I. L. R. 10 All. 272                                            | 7                  |
| Sasi <i>v.</i> Umakant (1914) 20 C. L. J. 153                                                                 | 501                |
| Satis Chandra <i>v.</i> Jogendra Nath (1916) I. L. R. 44 Calc. 345 ; 20 C. W. N. 1044 ; 24 C. L. J. 175       | 499                |
| Satis Chandra <i>v.</i> Kalidasi (1921) 34 C. L. J. 529                                                       | 568                |
| Satis Chunder <i>v.</i> Mohendro Lal (1890) I. L. R. 17 Calc. 849                                             | 307                |
| Satwaji <i>v.</i> Sakharlal (1921) I. L. R. 39 Bom. 175                                                       | 425                |
| Satya Kumar <i>v.</i> Satya Kripal (1909) 10 C. L. J. 503                                                     | 549                |
| Satya Prashad <i>v.</i> Motilal (1900) I. L. R. 27 Calc. 683                                                  | 457                |
| Sauni Bibi <i>v.</i> Siddik Hossein (1918) 29 C. L. J. 55 ; 23 C. W. N. 93                                    | 576                |
| Sayeed <i>v.</i> Ismail (1910) 7 A. L. J. R. 1176 ; I. L. R. 33 All. 233                                      | 454                |
| Schwan <i>v.</i> Cotton (1916) 2 Ch. 459                                                                      | 523                |
| Secretary of State <i>v.</i> Kalika Prosad (1910) 15 C. L. J. 281                                             | 149                |
| Secretary of State for India <i>v.</i> Krishnamoni Gupta (1902) L. R. 29 I. A. 104 ; I. L. R. 29 Calc. 518... | 139, 154, 306, 466 |
| Secretary of State <i>v.</i> Shanmugaraya (1893) L. R. 20 I. A. 80 ; I. L. R. 16 Mad. 369                     | 152                |
| Sellin <i>v.</i> Price (1867) L. R. 2 Ex. 189                                                                 | 348                |
| Seturatnam <i>v.</i> Venkatachala (1919) L. R. 47 I. A. 76 ; I. L. R. 43 Mad. 567                             | 136, 333, 541      |

|                                                                                    |               |
|------------------------------------------------------------------------------------|---------------|
| Shahazaddee Hazara v. Kaja Hossein (1869) 12 W. R. 498 ; 4 B. L. R.                |               |
| A C. 86                                                                            | 444           |
| Shama Charan v. Kshettor Monee (1899) L. R. 27 I. A. 10 ; I. L. R. 27              |               |
| Calc. 521                                                                          | 380           |
| Shambati v. Jago (1902) L. R. 29 I. A. 127 ; I. L. R. 29 Calc. 749...344, 538, 571 |               |
| Shambhu Nath v. Satis Chandra (1920) 25 C. W. N. 367                               | 479           |
| Shamlal v. Amar Prasad (1917) 2 Pat. L. J. 219                                     | 480           |
| Shanmuga v. Narayana (1916) I. L. R. 40 Mad. 743                                   | 308           |
| Sharooft v. Raghunatha (1915) 18 M. L. T. 401                                      | 294           |
| Sharpe v. Bickerdyke (1815) 3 Dow. 103                                             | 50            |
| Sheikh Mohammad v. Khadija (1914) 12 A. L. J. R. 132                               | 454           |
| Sheodas v. Bandhu (1881) 1 All. W. N. 91                                           | 468           |
| Sheodini v. Chatoorbhuj (1894) 12 C. L. J. 376                                     | 136           |
| Sheo Pargash v. Nawab (1919) I. L. R. 32 All. 321                                  | 480           |
| Sheorama v. Bharat Singh (1897) I. L. R. 20 All. 90                                | 308           |
| Sheo Singh v. Raghubans Kunwar (1905) L. R. 32 I. A. 203                           | 114           |
| Shew Prosad Bungshidhar v. Ram Chunder Haribux (1913) I. L. R. 41                  |               |
| Calc. 323                                                                          | 493           |
| Shib Narain v. Shankar (1900) 5 C. W. N. 403                                       | 337           |
| Shib v. Sheo (1906) I. L. R. 28 All. 418                                           | 340           |
| Shivajirao v. Vasantrao (1908) I. L. R. 33 Bom. 267                                | 327           |
| Shilabati v. Roderignes (1908) I. L. R. 35 Calc. 547                               | 584           |
| Shoshi Bhooshun v. Giris Chunder (1893) I. L. R. 20 Calc. 940                      | 142           |
| Shun Muga v. Manikla (1907) L. R. 36 I. A. 185 ; I. L. R. 32 Mad. 400              | 380           |
| Shushee Mohan v. Aukhil (1876) 25 W. R. 232                                        | 574           |
| Shyam Lal v. Rameswari (1915) 23 C. L. J. 82                                       | 331           |
| Shyam v. Satinath (1916) I. L. R. 44 Calc. 954                                     | 425           |
| Sibu Sundari v. Raj Mohan (1903) 8 C. W. N. 214                                    | 213           |
| Sidney v. North Eastern Railway Co. (1914) 3 K. B. 629                             | 191           |
| Skipworth v. Skipworth (1846) 9 Beav. 135                                          | 253           |
| Slater v. May (1705) 1 Salk 41 ; 2 Ld. Raym. 1071                                  | 460           |
| Smith v. Allen (1862) 3 F and F 156                                                | 177           |
| Smith v. Giddy (1904) 2 K. B. 448                                                  | 327           |
| Sonu v. Bahinibai (1915) I. L. R. 40 Bom. 351                                      | 470           |
| Sookhmoy v. Monohurri (1885) L. R. 12 I. A. 103 ; I. L. R. 11 Calc.                |               |
| 684                                                                                | 577           |
| Soondur Koomaree v. Kishoree Lal (1866) 5 W. R. 246                                | 343, 536, 568 |
| Soorjeemoney v. Denobundoo (1862) 9 M. I. A. 123                                   | 577           |
| Sorolah v. Bhooban (1888) I. L. R. 15 Calc. 297                                    | 32            |
| Sreeman v. Gopaul (1866) 11 M. I. A. 28 ; 7 W. R. P. C. 10                         | 267, 339      |
| Sreeramulu v. Kristamma (1902) I. L. R. 26 Mad. 143                                | 330           |
| Sri Gopal v. Pirthi Singh (1901) 6 C. W. N. 889 ; L. R. 29 I. A. 118 ;             |               |
| I. L. R. 24 All. 429                                                               | 272           |
| Srinivasayyar v. Lakshamma (1883) I. L. R. 7 Mad. 286                              | 17            |

|                                                                                                     | PAGE.         |
|-----------------------------------------------------------------------------------------------------|---------------|
| <i>Stewart v. Wilson</i> (1904) 141 Ala 405 ; 199 Am. St. Rep. 33 ...                               | 275           |
| <i>Störke v. De Sunette</i> (1737—8) Willes 66 ...                                                  | 255           |
| <i>Subba v. Belachandra</i> (1894) I. L. R. 18 Mad. 421 ...                                         | 72            |
| <i>Subbaraya Mudali v. Kamu Chelli</i> (1899) I. L. R. 23 Mad. 47 ...                               | 26            |
| <i>Sudisht Lal v. Sheobarat</i> (1881) L. R. 8 I. A. 39 ; I. L. R. 7 Calc.                          |               |
| • 245. ...                                                                                          | 344, 537, 569 |
| <i>Suffield v. Brown</i> (1863) 4 DeG. J. and S. 185 ...                                            | 518           |
| <i>Sumsuddin v. Abdul</i> (1906) I. L. R. 31 Bom. 165 ...                                           | 537, 569      |
| <i>Sunitibala v. Dhara Sundari</i> (1919) L. R. 46 I. A. 272 ; I. L. R. 47 Calc. 175 ...            | 529, 563      |
| <i>Suraj Narain v. Ekbal</i> (1912) L. R. 40 I. A. 40 ; I. L. R. 35 All. 80 ; 17 C. L. J. 288 ...   | 575           |
| <i>Surendra v. Dina Nath</i> (1915) I. L. R. 43 Calc. 554 ...                                       | 36            |
| <i>Surendra Krishna v. Rani Dasi</i> (1920) I. L. R. 47 Calc. 1043 ; 33 C. L. J. 34 ...             | 112, 380, 385 |
| <i>Surendra Nath v. Amrita Lal</i> (1919) 23 C. W. N. 763 ...                                       | 459           |
| <i>Surendra Nath Banerjee v. Secretary of State for India in Council</i> (1919) 24 C. W. N. 545 ... | 159           |
| <i>Suresh Chunder v. Jugut Chunder</i> (1886) I. L. R. 14 Calc. 204 ...                             | 312           |
| <i>Sureshwar v. Moheshrani</i> (1920) L. R. 47 I. A. 233 ...                                        | 548           |
| <i>Surja Kanta v. Sarat</i> (1914) 20 C. L. J. 653 ...                                              | 142, 417, 472 |
| <i>Surjiram v. Barhamdeo</i> (1905) 2 C. L. J. 288 ...                                              | 256           |
| <i>Suryyamani Dossee v. Dinabandhu Mallik</i> (1855) Boulnois 233 ; 6 M. I. A. 539 ...              | 32            |
| <i>Swerkrop v. Day</i> (1838) 8 A. and E. 624 ...                                                   | 460           |
| <i>Swiney v. Ballymena</i> (1888) 23 L. R. Ir. 122 ...                                              | 177           |
| <i>Syam Sundar v. Achan Kuar</i> (1898) L. R. 26 I. A. 183 ; I. L. R. 21 All. 71 ...                | 324           |

## T.

|                                                                                              |               |
|----------------------------------------------------------------------------------------------|---------------|
| <i>T. V. Tuljaram Row v. M. K. R. V. Alagappa Chettiar</i> (1910) I. L. R. 35 Mad. 1 ...     | 493           |
| <i>T. W. Thomas and Co. Ltd. v. Portsea Steamship Company Ltd.</i> (1912) App. Cas. 1 ...    | 173           |
| <i>Tacoordin v. Syed Ali</i> (1874) L. R. 1 I. A. 192 ; 13 B. L. R. 427 ...                  | 344, 537, 569 |
| <i>Tagore v. Tagore</i> (1872) L. R. I. A. Sup. Vol. 46. ; 9 B. L. R. 375 ; 18 W. R. 359 ... | 327           |
| <i>Tamarashherri v. Maranat</i> (1881) I. L. R. 3 Mad. 215 ...                               | 537, 569      |
| <i>Tamasha v. Ashutosh</i> (1909) 1 C. W. N. 513 ...                                         | 488           |
| <i>Tangaturi v. Hanumantha</i> (1916) 20 M. L. J. 479 ...                                    | 308           |
| <i>Taqi Jan v. Obaidulla</i> (1894) I. L. R. 21 Calc. 865 ...                                | 308           |
| <i>Tara Chand v. Brojo Gopal</i> (1912) 17 C. L. J. 120 ...                                  | 426           |
| <i>Tarinee v. Baman Das</i> (1850) Beng. S. D. A. 533 ...                                    | 29            |
| <i>Tarack Chunder v. Joodheshteer</i> (1873), 9 W. R. 178 ...                                | 574           |

|                                                                                                          | PAGE          |
|----------------------------------------------------------------------------------------------------------|---------------|
| Tasmania, The (1890) 15 A. C. 223 ...                                                                    | 183           |
| Taws v. Knowles (1891) 2 Q. B. 564 ...                                                                   | 522           |
| Taylor v. Asmedh (1865) 4 W. R. 86 ...                                                                   | 343, 536, 568 |
| Tekait Krishna Prasad v. Motichand (1913) L. R. 40 I. A. 140; I. L. R. 40 Calc. 635, 17 C. L. J. 572 ... | 311           |
| Thakore v. Bamanji (1903) I. L. R. 27 Bom. 515 ...                                                       | 436           |
| Thakur Baldeo v. Thakur Lalji (1906) 10 Oudh Cases 65 ...                                                | 299           |
| Thamal v. Abhayessuri (1909) 13 C. W. N. 1060 ...                                                        | 426           |
| Thomas v. Owen (1887) 20 Q. B. D. 225 ...                                                                | 522           |
| Thomas v. Thomas (1853) 2 K. and J. 79 ...                                                               | 441           |
| Thompson v. Hickman (1907) 1 Ch. 550 ...                                                                 | 273           |
| Thomson v. Eastwood (1877) 2 A. C. 236 ...                                                               | 88            |
| Thorp v. Cole (1835) 2 C. M. and R. 367 ...                                                              | 255           |
| Tinoodhan v. Trailokhya (1912) 17 C. W. N. 413 ...                                                       | 101           |
| Trailokya v. Jogendra (1908) I. L. R. 35 Calc. 1017 ...                                                  | 419           |
| Tressilian v. Caniffe (1855) 4 Ir. Ch. R. 399 ...                                                        | 269           |
| Tucker v. Bennett (1887) 38 Ch. D. 1 ...                                                                 | 267           |
| Turner v. Bable (1875) 60 Missouri 342 ...                                                               | 103           |
| Tyrell v. Painton (1894) P. 151 ...                                                                      | 373, 385      |

## U.

|                                                                                                |               |
|------------------------------------------------------------------------------------------------|---------------|
| Uma v. Tarini (1882) I. L. R. 9 Calc. 571 ...                                                  | 120           |
| Uman v. Gandharp (1887) L. R. 14 I. A. 127; I. L. R. 15 Calc. 20 ...                           | 267, 339      |
| Umesh v. Satish (1917) 22 C. W. N. 69 ...                                                      | 51            |
| Union Lighterage Co. v. London G. D. C. (1902) 2 Ch. 557 ...                                   | 523           |
| Upendra v. Umes (1910) 12 C. L. J. 25 ...                                                      | 439           |
| Upendra Nath v. Bindeshri Prosad (1915) 22 C. L. J. 451; 20 C. W. N. 210 ...                   | 331, 531      |
| Usmut Koowar, Rancee, v. Tayler (1865) 2 W. R. 307 ...                                         | 343, 536, 568 |
| Uttam Chandra v. Raj Krishna (1919) I. L. R. 44 Calc. 377; 34 C. L. J. 98; 24 C. W. N. 229 ... | 104           |
| Uttamram v. Kishordas (1899) I. L. R. 24 Bom. 149 ...                                          | 419           |

## V.

|                                                                             |     |
|-----------------------------------------------------------------------------|-----|
| Vaddadi v. Koduganti (1917) I. L. R. 41 Mad. 418 ...                        | 480 |
| Vaidyanatha v. Savitri (1917) I. L. R. 31 Mad. 75 ...                       | 330 |
| Varada v. Jeevratnammal (1919) L. R. 46 I. A. 285; I. L. R. 43 Mad. 244 ... | 436 |
| Varunda, Bai v. Bai Manegarri (1893) I. L. R. 18 Bom. 207 ...               | 95  |
| Vasudev v. Krishnaji (1895) I. L. R. 20 Bom. 534 ...                        | 310 |
| Vasudeva v. Narasamma (1882) I. L. R. 5 Mad. 6 ...                          | 347 |
| Velu v. Kumaravelu (1896) I. L. R. 20 Mad. 289 ...                          | 95  |
| Venkata v. Pappaya (1913) Mad. W. N. 838 ...                                | 112 |
| Venkata v. Rama (1884) I. L. R. 8 Mad. 249 ...                              | 16  |
| Venkatachari v. Rangasami (1909) 6 Mad. L. T. 192 ...                       | 436 |

|                                                            |     |     |     |
|------------------------------------------------------------|-----|-----|-----|
| Venkatchella v. Murthialu (1919) 37 M. L. J. 624           | ... | ... | 480 |
| Venkatarayadu v. Venkatramayya (1891) I. L. R. 15 Mad. 284 | ... | ... | 18  |
| Venkayya v. Sathiraju (1921) I. L. R. 44 Mad. 714          | ... | ... | 425 |
| Viswanathaserami v. Kamulammal (1915) 30 M. L. J. 451      | ... | ... | 428 |
| Vyas v. Vyas (1899) I. L. R. 24 Bom. 413                   | ... | ... | 437 |

## W.

|                                                                                            |     |         |     |
|--------------------------------------------------------------------------------------------|-----|---------|-----|
| Wahid Khan v. Zainab Bibi (1914) I. L. R. 36 All. 458                                      | ... | ...     | 528 |
| Walden v. Skinner (1880) 101 U. S. 577                                                     | ... | ...     | 266 |
| Walian v. Banke Behary Pershad Singh (1903) L. R. 30 I. A. 182 ;<br>I. L. R. 30 Calc. 1021 | ... | ...     | 297 |
| Walker v. Frobisher (1801) 6 Ves. 70                                                       | ... | ...     | 48  |
| Walker v. G. N. R. Co. (1890) 28 L. R. Ir. 69                                              | ... | ...     | 328 |
| Wallingford v. Mutual Society (1890) 5 App. Cas. 685                                       | ... | ...     | 550 |
| Wallis v. Hodson (1740) 2 Atk. 117                                                         | ... | ...     | 329 |
| Wasantrao v. Anandrao (1904) 6 Bom. L. R. 925                                              | ... | ...     | 574 |
| Watson & Co. v. Nistarini (1884) I. L. R. 10 Calc. 544                                     | ... | ...     | 250 |
| Wazir Jan v. Altaf Ali (1887) I. L. R. 9 All. 357                                          | ... | ...     | 454 |
| Webb v. Kirby (1857) 7 DeG. M. and G. 376                                                  | ... | ...     | 460 |
| Weeks v. Maillardet (1811) 14 East 568                                                     | ... | ...     | 348 |
| Wentworth v. Bullen (1829) 9 B. & C. 840 ; 33 R. R. 353                                    | ... | 102,157 |     |
| Wheeldon v. Barraws (1872) 12 Ch. D. 31                                                    | ... | ...     | 521 |
| Whiteman v. Sadler (1910) App. Cas. 514                                                    | ... | ...     | 510 |
| Wilde v. Gibson (1848) 1 H. L. C. 605                                                      | ... | ...     | 551 |
| Wilding v. Sanderson (1897) 2 Ch. 534                                                      | ... | ...     | 273 |
| Williams v. Williams (1867) L. R. 2 Ch. App. 294                                           | ... | ...     | 549 |
| William Sheriff v. Jogemaya Dasi (1899) I. L. R. 27 Calc. 535                              | ... | ...     | 120 |
| Windhan v. Windhan (1667) 2 Freeman 127 ; 2 Eq. Cas. Abr. 210                              | ... | ...     | 102 |
| Wise v. Rajendur Coomar (1869) 11 W. R. 200                                                | ... | ...     | 419 |
| Wood v. Slack (1868) L. R. 3 Q. B. 379                                                     | ... | ...     | 348 |
| Wooldridge v. Smith (1912) 243 Missouri 190 ; 40 L. R. A. N. S. 752                        | ... | ...     | 321 |
| Wordsley Brewery & Co. v. Halford (1903) 90 L. T. 89                                       | ... | ...     | 84  |
| Workman v. Belfast Harbour (1899) 2 T. R. 234                                              | ... | ...     | 177 |

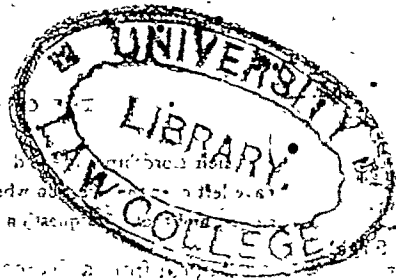
## Y.

|                                                      |     |     |     |
|------------------------------------------------------|-----|-----|-----|
| Yekeyamian v. Agniswarian (1869) 4 Mad. H. C. R. 807 | ... | ... | 326 |
|------------------------------------------------------|-----|-----|-----|

## Z.

|                                                    |     |     |     |
|----------------------------------------------------|-----|-----|-----|
| Zaharia v. Debi (1910) 7 I. C. 156                 | ... | ... | 282 |
| Zainul Abidin v. Durga Dai (1882) 2 All. W. N. 131 | ... | ... | 468 |
| Zooleka v. Zynul Abedin (1904) 6 Bom. L. R. 1058   | ... | ... | 445 |





# The Calcutta Law Journal

## Reports.

### PRIVY COUNCIL

PRESENT:—Lord Buckmaster, Lord Dunedin, Lord Shaw, Sir John Edge, and Mr Ameer Ali.

GULAB SINGH AND OTHERS

DIVAN BAHADUR BALLABHDAS,

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

*Estoppel—Mortgage—Decree for sale—Form of decree altered, by consent at instance of mortgagor—Mortgagor estopped from relying on altered form to defeat the purpose for which alteration was made—Sir lands in Central Provinces—Central Provinces Act (IX of 1883) section 42.*

The Central Provinces Tenancy Act, section 42, provides that "Every person whose proprietary rights in lands comprising sir land are sold in execution of any decree which does not expressly direct the sale of his rights in the sir land, shall become an occupancy tenant of that sir land."

A decree for sale in terms specified that cultivating rights in sir were included. This was modified at the instance of the judgment-debtor (mortgagor) and the words "all actual and reputed rights in the sir land" substituted, it being agreed between the parties that the question whether such rights included the cultivating right should be left over.

Thereafter the mortgagors contended that the modified decree did not comply with the literal wording of section 42 above cited, whether or not the mortgagee was entitled on the merits to sell the cultivating right.

*Held*, that it was not open to the mortgagors to assert that by the result of the alteration the rights of the mortgagee under the original decree were taken away.

P. C.  
1921.  
January, 28, 31.

P. C.

1931.

Gulab Singh

Ballabhai.

Their Lordships observed that it was unfortunate that the lower Court should have left over the question whether the rights to be sold included the cultivating rights, and that such question should have been decided at the time.

Appeal from a decree of the Judicial Commissioners' Court of the Central Provinces (Prideaux and Mittra JJ.) dated September 5, 1917, reversing a decree of the District Judge of Hoshangabad.

The appellants' predecessors executed a mortgage in favour of respondent's predecessors mortgaging *inter alia* "all actual and reputed rights in *sir*." The mortgagee sued and obtained a decree specifying that the cultivating rights in the *sir* would be sold. On appeal to the Judicial Commissioner the following order was passed (in 1907): "Both sides agree that it would be premature to decide what the position of a purchaser under the decree absolute for sale will be in respect of the *sir*. In the list of the mortgaged property on the back of the lower Court's decree for the words "cultivating rights in *sir* &c." the following words will be substituted, "with all actual and reputed rights as detailed in the mortgage." The mortgagee bought the suit villages at the sale and the sale certificates specified that they were sold "with all actual and reputed rights as detailed in the mortgage deed." He did not however obtain possession of the *sir* lands, and in settlement proceedings the appellants were recorded as occupying tenants of the *sir*. Thereupon respondent instituted the present suit for possession of the *sir* and cancellation of the settlement entry. The District Judge dismissed the suit, both as barred by section 47 of the Civil Procedure Code and because, as he held, the cultivating rights in the *sir* had not been sold. On appeal however the Judicial Commissioners (Prideaux and Mittra JJ.) reversed his decision and held that the sale included cultivating rights in *sir* and that the suit should have been treated as an application in execution and the plaintiff given possession of the *sir*. They decreed the suit. Hence this appeal by the defendant.

*Abdul Mujid* for Appellants: submitted that in view of the explicit language of section 42 of the Central Provinces Tenancy Act, the Judicial Commissioners could not hold that the cultivating rights were sold. The decree did not comply with the requirements of that section: it did not expressly direct the sale of the cultivating rights.

[*Lord Buckmaster*:- Was not the decree changed that it might cover whatever was conveyed by the mortgage? There was a dispute whether the mortgage included the cultivating rights. You

were a party to the arrangement. \* How can you come and contest now that it is to be decided on the mortgage ?]

• We are entitled to rely on the Statute. The decree, and the decree alone, has to be looked at : as it stands it does not specify the cultivating right. The Judicial Commissioners were wrong in holding that the mortgagedeed could be referred to.

[*Lord Buckmaster* : If your contention is right, the effect of the order of 1907 was that the Judge decided in your favour the very point which was left open.]

The mortgage did not in fact include the cultivating rights.

[*Lord Buckmaster* : It has been held that it did.]

[*Dunne, K. C.* for Respondent : This very mortgage was under consideration here in *Gulab Singh v. Gokuldas* (1) ; the Board negatived the contrary view.]

This point was not then before them. The cultivating rights were in fact not sold.

The sale certificates in these cases are only evidence, not a root of title : *Mussumat Buhans v. Lalla Buhoree Lall* (2) ; *Kour Balwant v. Hirachand* (3).

*Dunne, K. C.* (*Kenworthy Brown* with him) for Respondent : The Court when it modified the wording of the decree intended that all rights included in the mortgage should pass. In our suit we claimed the *sir* lands, and the trial Court held we were entitled to them. Then the parties came and said it was too early to decide the matter, and so it was left open : but it was never intended we should lose any rights we had in consequence of the alteration. It was on the defendant's objection that the alteration was made : they agreed that their right to cultivate should depend on the construction of the mortgage. *Prima facie*, rights include *sir*. The mortgage quite clearly covered it. Nothing was reserved in the mortgage, so the defendant's original right went with it : and their statutory right, under the Act never arose, for that it should arise a condition has to be fulfilled there must be a decree which does not include their *sir*.

*Majid* in reply. The amendment of the decree was expressly made to protect our interests, and we are entitled to rely on it.

(1) (1913) L. R. 40 I. A. 117 (131) ; I. L. R. 40 Calc. 784 ; 17 C. L. J. 619.

(2) (1872) 14 M. I. A. 496 (323) ; 10 B. L. R. 159 ; 18 W. R. 157.

(3) (1903) I. L. R. 27 Bom. 334 (337)

P. C.

1921.

Gulab Singh

Ballabhdas.

P. C.

1921..

Gulab Singh

Ballabhdas.

January 31.

Their Lordships' judgment was delivered by

**Lord Buckmaster** :— The suit out of which this appeal has arisen was instituted by the present respondent asking as against the appellants for possession of the *sir* and *khudkast* land that had been comprised in a mortgage executed on the 10th September, 1891. The only defence to the suit which now remains for consideration was based upon section 42 of Act IX of 1883, an Act which although it has been subject to certain subsequent modifications and change operates and binds the parties to this mortgage. That section runs in these terms:—

“ Every person whose proprietary rights in land comprising *sir*-land are, after this Act comes into force, transferred in any of the following cases, namely:—(a) when he sells those rights without expressly agreeing to transfer his right to cultivate the *sir* land, (b) when those rights are sold for an arrear of land revenue, (c) when those rights are sold in execution of any decree which does not expressly direct the sale of his rights in the *sir* land, shall become an occupancy tenant of that *sir* land, and the rent payable by him as such shall be fixed by a Revenue officer on application made by him or by his landlord.”

The relevant clause in the section is the last and the question that has been argued before their Lordships is whether or not the decree under which this sale was made did or did not expressly direct the sale of the rights in the *sir* land. The Judicial Commissioners from whom this appeal proceeds took the view that it did; but their Lordships think in the circumstances of this case it is unnecessary to examine and consider that question, and for this reason that the appellant in this case cannot be heard to maintain that it did not. The mortgage undoubtedly comprised all the rights in the *sir* land. In the course of the judgment by the Judicial Commissioners, it is stated that it was not contended before them that upon a true construction of the mortgage deed all the mortgagor's rights in the *sir* land were not mortgaged and these rights would obviously include the right to cultivate it and in a judgment of this Board on an appeal arising out of the same mortgage [*Gulab Singh v. Raja Seth Gokuldas* (1)], there is an expression of opinion to the same effect. That expression of opinion does not follow upon any elaborate argument; because in truth examination of the mortgage deed makes it plain.

In those circumstances, when the original suit was instituted on

the 22nd December, 1904, to obtain a decree for sale, the property which the mortgagee was entitled to sell was property from which the mortgagor could be excluded from his right of cultivation. On the 4th April, 1906, a decree for sale was made in that suit and that decree specified as the property that was to be offered for sale property including the cultivating rights in the *sir*.

An appeal was brought from that judgment and it was challenged upon many grounds. Among others it was urged that the Court had been wrong in holding that under the terms of the mortgage the mortgagee could exclude the mortgagor from his cultivating rights in the *sir*. That question by agreement between the parties was left over. It was in their Lordships' view an unfortunate circumstance that when such a matter, obviously open for decision, could and might then have been readily decided it should have been postponed to a later date with the inevitable result of provoking further dispute in the future. Both parties, however, agreed to this course and the judgment upon which the decree was then based contains this statement:

"Both sides agree that it would be premature to decide what the position of a purchaser under decree absolute for sale will be in respect of the *sir*. In the list of the mortgaged property on the back of the lower Court's decree for the words 'with cultivating rights in *sir*,' the following will be substituted, with all actual and reputed rights as detailed in the mortgage."

The one thing that is to their Lordships' mind quite plain is that this alteration was not intended to conclude the case in favour of the mortgagor, but to leave open to both sides the rights that would be established in the event of the mortgage deed being decided in the one way or in the other. Consequently the words in that decree, "with all actual and reputed rights as detailed in the mortgage" which were to be substituted for the express and exact words that were contained in the original decree were expressly and definitely intended and agreed by both parties to take effect in favour either of the mortgagor or the mortgagee according to the true meaning to be placed on the deed. The property has now been sold under that decree and the appellants here who represent the mortgagor claim that as those words do not comply with the strict conditions mentioned in section 42 their rights of cultivation have not been taken away; in other words they seek to make the decree operate in a manner opposite to the agreed purpose for which it was framed.

Their Lordships have already pointed out that they do not propose to examine the reasons why the learned Judicial Com-

P. C.

1921.

Gulab Singh

Balmabdas.

Lord Buckmaster.

P. C.

1921.

Gulab Singh

v.

Ballabhdas.

Lord Buckmaster.

missioners think that even that contention is not well founded. They base their view upon the ground that the circumstances in which that modification was made are circumstances which prevent the appellants from asserting that by the result of that alteration the rights of the mortgagee under the original decree with regard to this cultivation were completely taken away.

For this reason they think that the appeal should fail and they will humbly advise His Majesty that it be dismissed with costs.

*E. Dalgado*.—Solicitor for Appellants.

*T. L. Wilson & Co*.—Solicitors for Respondent.

A. P. P.

*Appeal dismissed.*

PRESENT : *Lord Buckmaster, Lord Dunedin, Lord Shaw,*  
*Sir John Edge and Mr. Ameer Ali.*

P. C.

1921.

February, 15, 17.  
March, 16.

MALAYANDI APPAYASAMI NAICKER

v.

THE MIDNAPORE ZEMINDARI CO. Ltd.

[ON APPEAL FROM THE MADRAS HIGH COURT.]

*Palayams in the Southern Districts of Madras—Their nature—If they are alienable—Military service tenures—Abolition of such tenures by proclamation—Police service tenures—Madras Regulation XXV of 1802.*

In the Southern Districts of Madras sundry palayams were originally held on military service tenure and subject to the payment of a tribute to the paramount power. But these military service tenures were abolished and determined by a Proclamation of the Governor in Council dated 1st. December 1801, and thereafter any character of inalienability attaching to the palayams by virtue of such tenure ceased.

Police Service tenures were abolished in 1816 by the Government of Madras : but it was held in the present case that it was not proved that the palayam had in fact been held on such a tenure.

Madras Regulation XXV of 1802 neither gives to nor takes away from the former owners of lands not permanently settled any rights which they then had.

Appeal from a decree of the Madras High Court (Wallis C. J. and Spencer J.) reversing a decree of the District Judge of Madura.

The facts are very fully stated in their Lordships' judgment. The Madura District Judge decreed the suit, holding that the palayam was inalienable: but his decree was reversed and the suit dismissed by the Madras High Court (Wallis C. J. and Spencer J.) Hence this appeal by the plaintiff.

*Donne K. C. (Narasingham* with him) for Appellant: submitted that the High Court were wrong in treating this polliam as an ordinary zemindari. It was an unsettled polliam. The case of *The Collector of Trichinopoly v. Lekkamani* (1) was not one of general application: it merely showed that that particular estate was in the nature of an ordinary zemindari and followed the ordinary law, not that all unsettled polliams were. Here the polliam was not joint family property. The family merely had a limited right to an estate as the appanage of an office. The position resembled that of the ghatwali tenures in Bengal. To the end Government took the view that the holder of the estate for the time being was a mere farmer for his life. The early sanads contained no power to transfer. In early days Government had absolute power as to the succession, and we submit that is still the case. The holder only had a life interest, and it was for Government to recognise any new incumbent. The hereditage applied if at all to the office and not to the estate. The land was service land attached to the office, and as such inalienable: Mayne, Hindu Law, sections 337, 338.

[*Lord Dunedin*: According to you there is no succession.]

There was no succession to the estate. Each new incumbent came in by virtue of succeeding to the office and was entitled to repudiate anything which his predecessor had done.

[*Lord Dunedin*: You are almost asking us to establish a new tenure.]

I admit I cannot give decisions or dicta as to polliams, but there are other estates in India, e. g. the ghatwali tenures, of this kind: and the absence of judicial recognition in Madras may be due to the fact that before *Sartaj Kuari's case* (2) it was not necessary, in the view of the law taken there, to raise points of this kind.

[*Lord Dunedin*: For the same reason it matters little what Government said before 1888.]

For a long series of years this was treated by every one as a military tenure. Both the family and the Government took that view. Prior to Regulation XXV of 1802 the holder's family had no title to the succession. If advantage had been taken of that Regu-

P. C.

1921.

Naicker

Midnapore Zemindari Co. Ltd.

(1) (1874) L. R. 1 I. A. 268 (282); 14 B. L. R. 115.

(2) (1888) L. R. 15 I. A. 51; 1 I. L. R. 10 All. 277.

P. C.

1921.

Naicker

Midnapore Zemindary Co. Ltd.

March, 16.

lation they would have acquired a title, but this was not done. The original tenure did not involve a proprietary right in the estate and it is not shown to have ever been changed.

*De Gruyther K. C. and Kenworthy Brown* for Respondents were not called on.

• Their Lordships' judgment was delivered by

**Sir John Edge**.—This is an appeal from a decree, dated the 18th February, 1918, of the High Court at Madras, which reversed a decree, dated the 11th September, 1916, of the District Judge of Madura.

The suit in which this appeal has arisen was brought to obtain, so far as is now material, against the Midnapore Zemindari Company, Limited, hereinafter referred to as the respondent Company, a decree for possession of the properties specified in schedules A and C of the plaint, and for mesne profits. The properties claimed were villages of the Palayam of Kannivadi. The suit was brought by two brothers, sons by different wives of the late Malayandi Appaya Naicker, a Hindu, one of whom only could have obtained a decree if their case had been proved. The first plaintiff on the record was Malayandi Appayasami Naicker, who was the son of Malayandi Appaya Naicker by his first or senior wife; he is the appellant here, and will be hereafter referred to as the appellant. The second plaintiff on the record was the son of Malayandi Appaya Naicker by his second or junior wife, and is by date of birth the elder of the two brothers. They were obviously joined as plaintiffs, owing to some doubt as to which of them was entitled, on the death of their father in 1911, to succeed to the Palayam by the custom of primogeniture applicable in the family. The second plaintiff did not appear and was not represented in the High Court, and he is not a party to this appeal, so need not again be referred to.

In the plaint it was alleged that the Palayam of Kannivadi is an ancient impartible Palayam, descendible to a single heir according to the custom of primogeniture; that the Palayam was conferred as a military fief by a Nayak ruler of Madura about A. D. 1500 upon an ancestor of the appellant who was placed in charge of one of the principal bastions of Madura Fort; that the Palayagar was by virtue of the tenure liable to be called upon to render military service by furnishing men and other aid, and for police duties, and to pay annual tribute to the State; that the Palayam continued to be held by the appellant's family under the same conditions of tenure and service after the assumption of the Dindigul country by the British; and "That the said Kannivadi Palayam is inalienable beyond the



life of the Palayagar for the time being, both by reason of the tenure and according to the custom of the family, which custom came into existence in consequence of the character of the tenure."

Briefly stated, the connection of the respondent Company with the Palayam of Kunnivadi according to the allegations in plaint is as follows:—The grandfather and father of the appellant in 1895 mortgaged the Palayam to the Commercial Bank, Limited, of Madras, in respect of debts of theirs which were not binding upon the appellant or upon the Palayam; on that mortgage the Bank obtained a decree, and in execution of that decree brought the Palayam to sale at auction, and at the sales purchased the estate in 1900, and on the 8th January, 1909, conveyed all their rights under the decree and under the auction sales to the respondent Company, who have since then been in possession.

Various other matters were alleged in the plaint as to which no arguments were addressed to their Lordships by either side.

The respondent Company in their written statement admitted that the Zamindari of Kannivadi was at the time of the sale to the Bank impartible and was descendible to a single heir according to the custom of primogeniture; but they denied that it had been conferred upon an ancestor of the appellant "for being in charge of a bastion of the Madura Fort"; denied that the estate had been granted or was ever held subject to any obligation of rendering military or police service, or was inalienable, or that the Zamindar had ever held any office by virtue of which he was under any obligation to perform military or police duties; denied that there is any family custom or anything in the tenure of the Kannivadi Zamindari which rendered it inalienable beyond the life of the Palayagar, and alleged that in law the Zamindar for the time being of the Kannivadi Zamindari always possessed an absolute interest in it with full powers of alienation. The respondent Company in their written statement pleaded several other matters, which in the view that their Lordships take of the case are not now necessary to be considered.

There were 27 issues fixed for the trial of the suit, but in their Lordships' opinion, the tenth issue was in the circumstances that upon which the decision of this appeal depends. It was:—"X. Whether the plaint mentioned Zamindari is inalienable either by custom or by virtue of its tenure?" If it was not inalienable either by custom or by reason of its tenure the Palayagar for the time was entitled to mortgage or to transfer absolutely every village in the Palayam according to his pleasure. That is the result

P. C.

1921.

Naicker

Midnapore Zemindary Co. Ltd.

Sir John Edge.

P. C.

1921,

Naicker

Middnapore Zemin-  
dary Co. Ltd.S<sup>r</sup> John Edga.

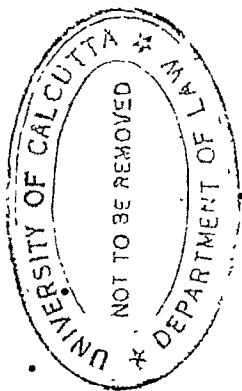
of the decisions of the Board in cases of impartible estates in India, which descend according to a custom of primogeniture. Until the law on this subject was placed by decisions of the Board beyond a doubt there was a current of judicial decisions in the Presidency of Madras to the effect that a holder of an impartible estate which descended by a rule of primogeniture could not transfer except for his own lifetime any part of the estate unless possibly for necessity.

The suit was tried by the District Judge of Madura. The District Judge states in his judgment that :—

"The plaintiffs base their case not on custom but on the military and police nature of the tenure and rely on the decision in I. L. R. 10, Allahabad 288, to establish that if such is its tenure it (the estate) is inalienable. . . . A distinction is also sought to be drawn between the present case and others in that in them there was a Permanent Settlement, whereas in the present case the estate was an unsettled Palayam till the Bank obtained a Permanent Sannad in 1905 from the Government."

The District Judge, after an elaborate consideration of all the historical references to the family to which the appellant here belonged, and of reports and proceedings of Officers of the Government, came to the conclusion that the Palayam of Kannivadi was held down to 1816 for police as well as military service, and that, although by 1816 the Government had removed from the Palayagar the duty of police services, the Government had not by the grant of a Zamindari sannad altered the tenure by which the Palayam was held. His final conclusion on the tenth issue is thus expressed :— "It seems to me, therefore, that as I have held the Palayam to have been held on a military and karal (Police) tenure, that as it had never been settled and as there was no express putting an end to the military liabilities, the estate must be held to have been held on the old tenure up to the grant of the sannad in 1905 to the Bank, and that therefore up to that date the estate was inalienable. This is my finding on issue 10." The District Judge made a decree in favour of the appellant here, against the respondent Company. From that decree the respondent Company appealed to the High Court at Madras.

The High Court in dealing with the appeal considered separately the question as to whether the Palayam of Kannivadi was held on military service tenure, and the question as to whether it was held on a tenure of performing for the State police duties. Their Lordships will adopt the same course in dealing with this appeal. The



learned Judges in their judgment referred to the fact that the Board in *Naragunty Luchmedavamah v. Vengama Naido* (1) which related to the Naragunty Palayam in the District of Chittore in the Presidency of Madras, had accepted as correct the explanation in Wilson's Glossary that Palayagars were originally petty Chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. With reference to that description the learned Judges found that:—"There can be no doubt that Kannivadi was a Palayam of this nature." It has not been suggested at the hearing of this appeal that that conclusion of the High Court was not correct. The High Court do not state when the Palayam of Kannivadi was first granted to an ancestor of the appellant; there was not on the record any reliable evidence on the point, but they obviously and rightly considered that the grant had been made before Dindigul, in which District Kannivadi is situated, was ceded to the East India Company by the Treaty of Seringapatam, 1792.

It may be accepted as a fact that the Palayam of Kannivadi was originally held on military service tenure and subject to the payment of a tribute to the paramount power. Where lands in British India are held on military service tenure, there is good reason for holding that "no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged." (See Mayne's Hindu Law, paragraph 337.) "A Palayam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time." [See the *Naragunty* case (1) cited above.] The question, so far as it depends on military service tenure is concerned, is—Did the Palayam continue to be held on military service tenure when the mortgage to the Bank was made in 1895? The High Court held that the military service of Palayagars of the Madura and Tinnevely District, was abolished in 1801 by the Proclamation of the 1st December, 1801, of Lord Clive, Governor in Council.

On the 2nd October, 1799, in consequence of a rebellion which had been fomented and supported by Palayagars of the Tinnevely District, Major Bannerman, as Military Commandant of the Southern Detachment, had been obliged to issue a Proclamation to the Palayagars, landholders and inhabitants of the Tinnevely

(1) (1861) 9 M. I. A. 66.

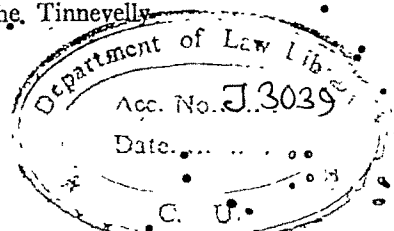
P. C.

1921.

Naicker

Midnapore Zemindary Co. Ltd.

Sir John Edge.



P. C.

1921.

Naicker

v.

Midnapore Zemindary Co. Ltd.

Sir John Edge.

District, ordering the Palayagars to destroy all forts in their Palayams and to deliver all guns, gingal pieces, firelocks, matchlocks and pikes in their possession, or in the possession of any of the inhabitants, to the Military Detachment sent to receive them. The Court of Directors in their letter of 11th February, 1801, to Fort St. George (the Government of Madras), sanctioned the gradual introduction of a permanent land settlement in the presidency, but laid down that it was of first importance that "all subordinate military establishment should be annihilated within the limits subject to the Dominions of the Company." That must have meant that military service tenures should be abolished in the Districts subordinate to Fort St. George.

In consequence of those orders of the 11th February, 1801, Lord Clive, Governor in Council, issued the Proclamation of the 1st December, 1801, which was addressed to the Palayagars of the Madura and Tinnevely districts. That proclamation referred to a proclamation of the 9th December, 1799, of the Governor in Council of Fort St. George addressed to the Palayagars of Tinnevely and to a rebellion excited and maintained in arms by Palayagars of Panchalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga. The following paragraphs of the Proclamation of the 1st December, 1801, show clearly what the Government of Fort St. George intended.

"Wherefore the Right Honourable Edward Lord Clive, Governor in Council, aforesaid, with the view of preventing the recurrence of the fatal evils which have attended the possession of arms by the Palayagars and Sherogars of the southern provinces and with the view also of enforcing the conditions of the Proclamation published by Major Bannerman on the 2nd October, 1799, formally announces to the Palayagars, Sherogars and inhabitants of the southern provinces the positive determination of His Lordship in Council to suppress the use and exercise of all weapons of offence with the exception of such as shall be authorized by the British Government;

"The military service heretofore rendered by the Palayagars and Sherogars having been suppressed and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of firearms and weapons of offence is manifestly become unnecessary to the safety of people. The Right Honourable the Governor in Council therefore orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevely, Ramnadpuram, Sivaganga, and Madura to deliver the said arms consisting of muskets, matchlocks, pikes (to?) Lieutenant-

Colonel Agnew, the Officer now commanding the forces in those provinces.

It is unnecessary to assure the people of the southern provinces that the Right Honourable the Governor in Council in the determination of carrying this resolution into effect can be governed by no other motives than those connected with the sacred duty of providing for the permanent tranquillity of those countries. His Lordship disclaims every wish of subjecting the chiefs and hereditary landlords to any humiliation, but the discontinuance of the general use of arms according to the prevailing habits of those countries being indispensably necessary to the preservation of peace and to the restoration of prosperity, the Governor in Council hopes that the chieftains will with cheerfulness sacrifice a custom now become useless to the attainment of those important objects.

"With a view therefore of tempering the execution of their general resolution with as great a degree of attention as may be practicable to the hereditary customs and to the personal feelings of the chieftains, the Right Honourable Lord Clive, Governor in Council aforesaid, hereby authorises each Palayagar or Zamindar to retain a certain number of peons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars. But the said number of authorised pikemen shall be fixed and shall continue to be limited for the better execution of this intention, the said number of pikemen shall be determined by the Governor in Council of Fort St. George upon the representation of the several Palayagars transmitted through the regular channel of the Company's Collector, after proclamation of the number so fixed, the names of the said pikemen shall be registered in the public catchery of the Collector, and the pikes shall in like manner be publicly stamped by the Collector with a mark bearing the sanction of the British Government."

"In the confident expectation of reclaiming the people of the southern provinces from the habit of predatory warfare and in the hope of inducing them to resume the arts of peace and agriculture, the Right Honourable Edward Lord Clive, Governor in Council of Fort Saint George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of British Government to establish a permanent assessment of revenue on the lands of the Palayams upon the principles of Zamindari tenures, which assessment being once fixed shall be liable to no change in any time to come, that the Palayagars becoming by these means Zamindars of their hereditary estates will be exempted from all military service and

P.C.

1921.

Naicker

v.

Midnapore Zemindary Co. Ltd.

Sir John Edge.

P. C.

1921.

Naicker

Midnapore Zemindary Co. Ltd.

Sir John Edge.

that the possessions of their ancestors will be secured to them under the operation of limited and defined laws to be printed and published as well for the purpose of restraining its own officers to the regulations and ordinances of the Government as of securing to the people their property, their lives and their religious usages of their respective castes."

• It appears to their Lordships that by that Proclamation military service tenures in the districts to which the Proclamation applied were abolished whether the Palayagars obtained a permanent assessment sannad or not.

Following upon the Proclamation of the 1st December, 1801 came Regulation XXV of 1802, under which a permanent settlement so far, if at all, as it has any bearing on this case was made with the Bank, and an Istimvari sannad was granted to the Bank on the 29th September, 1905. The Palayam estate had not been previously settled. The Palayagars generally, including the Palayagar of Kannivadi, refused to accept Istimvari sannads, and when the Palayagar of Kannivadi for the time being was willing to accept a sannad the Government refused in 1883 to grant him one. There can be little doubt that that refusal to grant him a sannad was out of consideration for the family, as it was generally believed that it was more difficult for a creditor to bring to sale unsettled Palayams than Palayam estates which were held under an Istimvari Settlement sannad. It appears to their Lordships that Regulation XXV of 1802 does not affect the question as to whether in 1895 the Palayam of Kannivadi was alienable or not. The Board decided in the *Maringabusi* case, [*The Collector of Trichinopoly v. Lekhamani and others* (1)], that the affirmative words of the 2nd section of Regulation XXV of 1802, "That in consequence of the assessment the proprietary right of the soil shall become vested in zemindars, &c.," did not either give to or take away from the former owners of lands not permanently settled, any rights which they then had. It (a settlement under that Regulation) merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them" (1 I. A., p. 306). In that case the Board approved of the opinion expressed by the High Court of Madras: "That the existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property" (p. 312). In the same case the Board held that: "The only differ-

ence between a polliam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power" (p. 313). In the present case the learned Judges of the High Court held that the tenure of military service under which the Palayam of Kannivadi had been held had been abolished and determined by the Proclamation of the 1st December, 1801, and with that decision their Lordships have agreed.

It remains to be considered whether the Palayam of Kannivadi was held under a tenure of the Palayagar rendering police service to the State. The best and most reliable evidence that the Palayam was held on police service tenure would be a sannad showing that it was so held. Only two sannads which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are sannads which were granted respectively on the 13th July, 1797, for the Fasli year 1207, and the 13th July, 1800, for the Fasli year 1200, to Appaya Naicker, the then Palayagar. There is nothing in either of those sannads from which their Lordships can infer that the Palayam of Kannivadi was held on a tenure of rendering police duties to the State. The conditions in those sannads by which the Palayagar was bound to protect the inhabitants by preventing as far as might be in the power of the Palayagar robberies, depredations, etc., in their properties; to deliver up persons guilty of murder; and not to give shelter to deserters, and to apprehend and deliver them to the collector are similar to the duties which all landholders and zamindars in British India have to perform. Even if it were possible to infer from those sannads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Their Lordships hold that in 1895 the Palayam of Kannivadi was not inalienable, and that the then Palayagar had power to alienate it to suit his own purposes, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

*H. S. L. Polak*—Solicitor for appellant.

*Wontner & sons*—Solicitors for respondents.

A. P. P.

*Appeal dismissed.*

P. C.

1921.

Naicker

v.

Midnapore Zemin-  
dary Co. Ltd.

*Sir John Edge.*

P. C.

1021.

February, 23, 24.  
April, 21.PRESENT : *Lord Buckmaster, Lord Dunedin, Lord Shaw, and  
Sir John Edge.*

MUSTI VENKATA JAGANNADHA SARMA

MUSTI VEERABHADRAYYA.

[ON APPEAL FROM THE MADRAS HIGH COURT.]

*Land-Law of Madras—Service tenures—Karnam Lands, nature of title thereto—If the office-holder's family have any rights in such lands—Emancipation of Inams under Inam Rules of 1859—Whether it enures for the benefit of an office-holder's family or to himself exclusively—Distinction between personal or subsistence grants and service Inams—Madras Acts II of 1894 and III of 1895—Madras Karnam Regulations of 1802, 1806, and 1831—Difference between the law of the Palayam and the law of the Karnam.*

The lands comprising the emoluments of a Karnam or village accountant in Madras are not joint family property. They are an appanage of the office, inalienable by the office-holder, and designed to be the emolument of the officer into whose hands soever, the office may pass. In many cases there may be a long continuance of the office in a particular family, but there is no absolute right of hereditary succession; the Karnam is a personal appointee, and if a stranger is appointed the lands go with the appointment to the stranger selected, without being subject to any claims thereon as a family right by relatives of former holders of the office.

This was the law in Madras even before Madras Act II of 1894 and Madras Act III of 1895, which make it clear that eligibility for the appointment of Karnam is a matter personal to the appointee.

When Karnam lands are enfranchised under the Inam Rules of 1859 the enfranchisement is to the office holder himself and does not enure for the benefit of his family.

In this respect Karnam lands, which are service Inams, differ from Palayam lands, which are now merely personal Inams. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar like an ordinary zemindari. But in the case of Karnams the lands follow the office.

*Venkata v. Rama* (1) approved, *Gunnaiyan v. Kamakchi Ayyar*, (2) and *Fingala Lakshmiipathi v. Bommi reddipalli Chalamayya* (F. B.) (3) overruled.

Appeal from a decree of the Madras High Court (Ayling and Seshagiri Ayyar, JJ), reversing a decree of the Temporary Subordinate Judge of Coconada.

(1) (1884) I. L. R. 8 Mad. 249.

(2) (1902) I. L. R. 26 Mad. 339.

(3) (1907) I. L. R. 30 Mad. 434.



The facts are sufficiently stated in their Lordships' judgment. The trial Judge dismissed the suit, the High Court gave plaintiff a preliminary decree for his share. Hence this appeal.

P. C

1921.

Jagannadha

v.

Veerabhadrayya.

*Dunne K. C. (Narasimham with him)* for Appellant: The Government has power to appoint and dismiss Karnams, but they appoint from the family if possible. Here Government removed a father and appointed his eldest son, who sued for the lands in the revenue Court under Madras Act III of 1895 and got a decree and possession in 1902. The present suit for partition was brought in 1916, and is barred, we submit, by limitation.

[*Sir John Edge*: Would not the decision in 1902 be *res judicata*.]

The suit was in a revenue Court, dealing with the matter, it may be, on a special basis. They appealed up to the Board of Revenue, which dismissed the appeal in 1905. The point of *res judicata* has not been raised below, or we might succeed on it: till the lands were enfranchised in 1906 the Civil Court had no jurisdiction.

The High Court has reversed the trial Judge on the authority of an unreported case decided by themselves, Appeal No. 79 of 1917. The decision then was that a service Inam and the emoluments thereof were joint family property, and that the coparcenary interest continued after enfranchisement.

[*Lord Dunedin*: The effect of enfranchisement was under determination in *Ramayya v. Jagannadha*, (1). As long as the lands are attached to the office, they are necessarily impartible: but it may be contended the bar on partition is removed when they are enfranchised.]

In many Madras cases previous to 1902 it had been laid down that in properties attached to an office nobody but the holder of the office himself had an interest. In *Srinivasayyar v. Lakshamma* (2) a dismissed Karnam sued to recover his lands, which had been enfranchised to his successor, and it was held that the lands being attached to the office, the suit would not lie. *Bada v. Hussu Bhai* (3) is to the same effect. In *Venkata v. Rama* (4), a Full Bench held that a member of the old office holding family could not recover lands which had been enfranchised to a stranger appointee.

[*Lord Dunedin*: In that case there are two root ideas; the view of Turner, C. J. that the lands were the emolument of the office and not joint family property; and the view of Hutchins, J.

(1) (1915) 1. L. R. 39 Mad. 930. (2) (1883) 1. L. R. 7 Mad. 206.

(3) (1883) 1. L. R. 7 Mad. 236. (4) (1884) 1. L. R. 8 Mad. 249.

P. C.

1921.

Jagannadha

Vasrabhadrayya.

that subject only to a veto the office was hereditary. The question is whether the tenure is official or hereditary.]

The hereditary right to the office is irrelevant: the question is as to the property in the lands which go with the office. The only person who has any right to them is the holder of the office: in the case cited, if it had been coparcenary property, the plaintiff as adopted son would have had a share. What respondent has to establish here is coparcenary right, and that was negatived there: *Venkata v. Rama* (1) was followed in *Venkatarayadu v. Venkataiama* (2) and *Dharani Pragada v. Kadambari* (3). In *Gunnaiyan v. Kamakchi Ayyar* (4) however, Bhashyam Ayyengar J. held that enfranchisement did not enure for the benefit of the enfranchisee only, as it was merely the recognition of an existing right. The decision itself is not against us, but the judgement is, in so far as it says that a service tenure is on the same footing as a personal one, and the learned Judge applies to the former the decision in *Narayana v. Chengalamma* (5). The latter case was one of an unsettled palayam and both parties treated it not as a service tenure at all but as an ancestral estate.

In *Pingala Lakshmiathi v. Bommireddipalli Chalamayya* (6) a Full Bench applied this to Karnam lands, and held that enfranchisement did not confer on the persons named in the title deed any right in derogation of those possessed by others in the main at the time of enfranchisement. In that case the man claiming a share was in fact named in the inam deed.

In *Ramayya v. Jagannadhan* (7) it was held that the effect of enfranchisement was not to destroy the rights of any members of a joint family which had a hereditary interest in the Inam. But the whole point is whether any members of the joint family have that hereditary right. These latter cases hypothesize that there are coparcenary rights in property attached to the office of Karnam, and it is just that which we deny.

There have been no Karnam cases before the Board, but the principle is the same as that of ghatwali estates, as to which it has been held they are not possessed by the family: the office is hereditary, but the title to the lands is not hereditary: *Durga Prasad Singh v. Tribeni Singh* (8).

(1) (1884) I. L. R. 8 Mad. 249.

(2) (1891) I. L. R. 15 Mad. 284.

(3) (1897) I. L. R. 21 Mad. 47.

(4) (1902) I. L. R. 26 Mad. 339.

(5) (1886) I. L. R. 10 Mad. 1.

(6) (1907) I. L. R. 30 Mad. 434.

(7) (1915) I. L. R. 39 Mad. 930.

(8) (1918) L. R. 45 I. A. 251 (256) 28 C. L. J. 508.

Reference was also made to Madras Act II of 1894, sections 3, 9 (6), 16 (2), 17, 20, 28 and 29; and to Madras Act III of 1895, sections 3, 7 (1), 13, and 21; and to the Inam Rules contained in the Standing Orders of the Board of Revenue, 1907, p. 180.

*Narasimham* followed: Government has power to resume service Inams, and can appoint any one it pleases: *Gunnaiyan v. Kamakchi Ayyar* (1).

The recent decisions in Madras lay down that the joint family is entitled to a share: even if they are right, it must be the joint family at the date of enfranchisement: there was no joint family between the plaintiff and defendant's family in 1907.

*De Gruyther K. C.* (*Dube* with him) for Respondent: The true position is that the lands of a Karnam are lands held by the family of the Karnam, subject to the burden of performing the duties: the next heir succeeds and the lands do not go out of the family, unless no single member of the family can perform the duties. The lands are not affected at all by the enfranchisement: the only thing affected is the Inam—the revenue. Government never make any demand on the owner of the lands. After enfranchisement the position is as if there had never been any service.

In this case both sons had an existing interest in the land in the father's lifetime. The land was held by the elder brother as family property and I was entitled to partition.

*Venkata v. Rama* (2) was different: the lands were held by an outsider, and it was held a member of the old family could not recover: it was not a case of coparcenary.

The position of Karnams is set out in the Fifth Report to the House of Commons in 1812, Vol. II, (Madras) p. 11 et seq: which lays down that by custom the lands of a karnam are hereditary, and all members of the family participate in the benefit.

Madras Regulation XXIX of 1802 was the first to deal with these karnams. By sections 4 and 5 the heir is to be chosen except in case of incapacity. A competent heir had the right to claim, and there is no provision for dismissal except on the sentence of a Court. Regulation VI of 1831 declares the emoluments inalienable. Here you have joint-family property, impartible because of a Regulation: probably partible before.

[*Lord Buckmaster*: But the property is attached to an office which may go outside the family.]

(1) (1902) 1 L. R. 26 Mad. 339 (348).

(2) (1884) 1 L. R. 8 Mad. 249.

P. C.

1921.

Jaganadha

Veerabhadrayya.

P. C.

1921.

Jagannadha.

Veerabhadra.

I admit that if on enfranchisement the land is held as the self-acquired property of the enfranchisèe plaintiff has no case : but I submit the land is held as the enfranchisèe's ancestral property.

Madras Act III of 1895, section 10 provides for filling up vacancies in the office : by sub-section (2) the succession is to devolve on a single heir. These are hereditary estates : the next heir succeeds, and the rights of the others are to treat the land as joint family property, to enjoy portions of them, and to be maintained out of them. That in fact happened here.

[*Lord Buckmaster* : I do not see how the heir succeeds to the office. He succeeds to the right to be nominated to the office.]

His title arose not by nomination but by succession.

Notwithstanding that one member of a family is the Karnam, the others can hold and enjoy the lands as joint family property : *Gunnaiyan v. Kamakchi Ayyar* (1). Enfranchisement merely releases the estate from the burden of service : the man who held it before held it on behalf of the family and subject to that burden, he now holds it free from that burden but still on behalf of the family.

*Dunne, K. C.* in reply : This is and always has been an office which must be the subject of appointment. When there is a new appointment a new set of rights arises. Such joint enjoyment as there has been here was a matter of permissive arrangement not of right.

C. A. V.

Their Lordships' judgment was delivered by

April, 21.

**Lord Shaw** :—This is an appeal from a decree, dated the 19th February, 1918, of the High Court of Judicature at Madras which reversed a decree, dated the 14th March, 1917, of the Temporary Subordinate Judge of Cocanada. This last-mentioned decree remanded the suit so that partition might be decreed in favour of the plaintiff-respondent.

The suit was for the recovery of the possession of a one-half share of lands specified in the schedule attached to the plaint. It was admitted that the suit properties had formed the emoluments attached to the office of Karnam or Village Accountant in the village of Pandalapaka.

These lands were enfranchised, as after-mentioned, in the year 1906 by an Inam, a title deed granted to Venkatramayya, the appellants' father.

The pedigree is as follows :—

P. C.

1921.

Jagannadha

Veerabhadrayya.

Lord Shaw.

Subbarayudu.

Venkatramayya

Musti Veerabhadrayya  
(plaintiff)

Musti Venkata Jagannadha  
(defendant).

The appellant's grandfather Subbarayudu was removed from his office of Karnam for incapacity due to old age, and his eldest son Venkatramayya was appointed Karnam on 23rd February, 1902. Shortly thereafter the former Karnam died.

It is a fact in the case which is admitted that prior to the enfranchisement and Inam grant of 1906 all the family properties which were capable of division were divided into two equal shares between Venkatramayya and Veerabhadrayya. No partition took place of the service Inam lands which are in suit in the present case.

The appellant maintains that the respondent had no right to such lands ; that they were not joint family property, and were for that reason not included within the scope of the division made ; and that the enfranchisement of the Karnam lands in 1906 and the procedure with regard thereto are consistent with the view that the lands were impartible and were confirmed as separate property by the then holder of the office of Karnam ; while upon the other hand the respondent maintains that a division of this particular property, although it is undoubtedly Karnam land, must now be decreed and that the enfranchisement of 1906 could not destroy the nature of the property as joint family property and the interest of the respondent therein.

The Subordinate Judge took the former view and the High Court took the latter. The question in the appeal is which of these views is correct.

The point in issue is compendiously put in the respondent's case in these terms : "Whether the enfranchisement in the name of the defendant's father enured for the benefit of the family or to himself exclusively ?"

It is admitted that the lands in suit formed the emoluments of the Karnam or Village Accountant. A large body of authority on the subject of the nature of the title to lands so held was cited to the Board. There can be no question of assailing (whatever be the nature of the title to the property itself) the validity of the

P. C.

1951

Jagannadha

Veerabhadrayya.

Lord Shaw

enfranchisement under the Inam rules. The suit proceeds upon that footing and asks for a division of the property on the assumption that it has been duly enfranchised under the Inam Rules of 1859.

It is, however, highly expedient to note the exact terms of the enfranchisement itself. It is dated the 21st March, 1906, and is signed by Mr. J. A. Atkinson, Inam Commissioner. It is thus expressed ;—“No. 1520.

“ Title deed granted to Musti Venkatramayya.

“ By order of the Governor in Council of Madras acting on behalf of the Secretary of State for India in Council, I acknowledge your title to an Inam consisting of the right to a portion of the Government revenue on land measuring (forty-five) 45—83 acres of dry (be the same a little more or less) originally granted for service and situated in the village of Pandalapaka in the Estate of Pithapur, in the Taluk of Ramachandrapur in the District of Godavari.

“ 2. This Inam, being held for Karnam Service now otherwise provided for shall now be deemed freed of such service, but shall henceforth be subject to the payment of an annual quit rent of Rupees (296. 8. 0) two hundred and ninety-six and annas eight exclusive of Rupees (24. 0. 0) twenty-four already payable as jodi to the proprietor, which quit rent is hereby imposed upon the Inam in commutation both of the said service and of the reversionary interest possessed by Government in the Inam. The Inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper, subject only to the payment of the above-mentioned quit rent and jodi (which quitrent will be liable to revision at the periodical re-settlements of the district), and to the provisions of the next clause.

“ 3. The right of Government to all minerals, if any, in the land referred to in clause 1 above is hereby expressly reserved to Government, and the revenue referred to in such clause represents only the right of Government to a share in the surface products of such land.

“ Dated 21st March, 1920,

“ MADRAS.

(Signed) J. A. ATKINSON,  
Inam Commissioner.”

There can be no question as to the absolute nature of this grant in favour of the appellant's father. The Inam is confirmed “ to you, your representatives and assigns, to hold or dispose of as you or they think proper ” subject only to the payment of quit-rent, &c., and to the reservation of minerals.

It is worthy of note first that this enfranchisement happens also to be in entire accord with the Standing Order of the Board of Revenue of Madras as to Inams No. 52 of 1897, and second that that Standing Order makes the distinction between grants which are personal or subsistence grants and those which are Service Inams. It is to the latter category that the enfranchisement in the present case properly belongs. By the Standing Order alluded to it is provided by Section 29 that:—

“XXIX. Inams thus enfranchised, either by the payment of an annual quitrent, or of a single fixed sum equal to twenty years’ purchase of the quitrent, will, like every other description of property, be subject to the jurisdiction of the ordinary Courts of Justice in all questions of disputed right, succession, &c. and they may be mortgaged, sold and transferred in any manner, at the will and discretion of the inamdar, subject to the payment of quitrent, if such is not redeemed.”

The Board has carefully considered the long series of authorities quoted in argument and it is of opinion as follows:—

(1) The lands comprising the emoluments of a Karnam were attached to the office held by him as such;

(2) When the Karnam for the time being was removed from office he lost all right and title to the lands;

(3) Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the decision of the revenue authorities to remove a Karnam from office and to appoint another, were not open to question in Courts of law, and

(4) If this right of selection were exercised in favour of a stranger, there being, for example, within the range of the family (which had been accustomed to have one of its members holding the office of Village Accountant) no person who in the opinion of the revenue officer was suitable for the position, then the appointment went to the stranger selected and the lands with it as emoluments without any claim thereon as a family right by relatives of former holders of the office.

These propositions seem to their Lordships to have been part of the law of Madras long prior to the Acts of 1894 and 1895, which are now to be referred to; but it is to be observed with regard both to Madras Act No. II of 1894, Section 10, and Madras Act No. III of 1895, Section 10, that eligibility, whether for nomination to the office of Karnam by the proprietor of the village under the former Act or by the Collector under the latter, is a matter personal

P. C.

1921.

Jagannatha

Veerabhadraiyya.

Lord Shaw.

P. C.

1921.

Jagannatha

Veerabhadrayya.

Lord Shaw.

to the nominee, clearly, taking into account such things, not only as sex and age, but also the physical and mental capacity to discharge the office and even the educational qualifications of the person selected.

It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

It may be, however, that the course of authority leads to a different result from that to which principle and administrative convenience would seem to point. Their Lordships will therefore examine the authorities, which, as will be seen hereafter, are conflicting.

In *Srinivasayyar v. Lakshamma* (1) it was held that where a hereditary village officer who had been dismissed sued to recover land which had formerly been the emoluments of the office and which had been enfranchised and granted to another person holding the office at the time of the enfranchisement, such a suit could not lie. Their Lordships quote the judgment of Turner, C. J., as containing a compact statement of law upon the point:—

"The lands were attached to the office of Karnam as its emolument; when the appellant was removed from the office, he lost his right to the land.

"The circumstance that money may have been expended on the improvements of the land in the expectation that the office with its emolument would be continued to the family, would not give the appellant any title to recover the land in the events that have occurred.

When he was removed for misconduct, the office and emoluments were conferred on a stranger, and with the decision of the revenue authority on that question we cannot interfere. While the office was held by a stranger, the Government resolved to sever the lands from the office and to offer them to the then office-holder for enfranchisement: the holder accepted the offer and became the owner."

The decision, it will be observed, non-suited the former holder of the office from recovering the land. But the same result followed in the subsequent case of *Bada v. Hussu Bhai* (2) in which a member of the family of an officer-holder who had never held the

(1) (1883) 1 L. R. 7 Mad. 206.

(2) (1883) 1 L. R. 7 Mad. 235.



office sued to recover a share of the lands, and the same learned Judge put the point thus :—

“ The land was appurtenant to the office, and the Government determined to sever it from the office and to allow the office-holder or office-holders for the time being to enfranchise it. The appellant, who was never the holder of the office, could not have a claim on its emoluments.”

That this was the law of Madras was stated by the Full Court in the year 1884, in *Venkata v. Rama* (1). The judgment of Hutchins, J., in referring to the Full Court thus states the point :—

“ To ensure the office being held by a-qualified person, the executive was compelled to reserve to itself the determination of all claims.”

Following the line of his dissent, however, he added :—

‘ But subject to this one condition the absolute right of hereditary succession has been repeatedly recognized.’

He dissented, as has been said, on this point from the judgment of the Full Bench. But in the opinion of their Lordships the judgment then pronounced (and it is observed that Turner, C. J., and Muttusami Ayyar, J., were members of the Court), was clear and sound. The Madras Regulations of 1802, 1806 and 1831 are most carefully considered, and the general result is stated in the following sentences of the judgment of Turner, C. J. :—

“ When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument.”

Even on the footing that the respondent in the present case had established that the office was one in which he as a member of the family had a species of expectation or hereditary right, the decision would equally apply to the present case. The judgment of Muttusami Ayyar, J., upon this point was clear.

“ According to the law, therefore, as it stood prior to the enfranchisement of the Inam a right to the land could only be legally acquired through the right to the possession of the office,

(1) (1884) I. L. R. 8 Mad. 249.

P. C.

1931.

Jagannadha

Veerabhadrayya.

Lord Shaw.

P. C.

1921.

Jagannadha

Veerabhadrayya.

Lord Shaw.

and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

The same reasoning would have applied to any attempt to partition the lands.

In the opinion of the Board the law of Madras was thus soundly stated and that judgment should not have been disturbed.

It was followed in the case of *Venkatarayadu v. Venkataramayya* (1) and as the judgment of Sir Arthur Collins seems strictly to apply to the present litigation these sentences from it are quoted and are adopted:—

"We think that the decision of the Subordinate Judge is opposed to the principles laid down in the Full Bench decision in *Venkata v. Rama* (2). The land which formed the emolument of the office of Karnam did not become the family property of the person appointed to the office, although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the Karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased."

The same result was reached in *Dharanipragada Durgamma v. Kadmbari Virrasu*, (3), in which the principle of the Full Bench case was again followed.

In *Subbaraya Mudali v. Kamu Chetti* (4), "lands which had been held by a deceased as moniem service Inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate it was held that the right of the widow under the grant was not limited to that of a widow's estate." The case was expressly decided as following the Full Bench decision. Subsequently, with one exception about to be noted, the law of Madras up to the year 1899 followed the consistent line which has just been stated.

The difficulty, however, which appeared in the later decisions sprang from the case of *Narayana v. Chengalamma* (5). It must, however, be observed that that was not a Karnam case. It was the case of a Palayan; and in their Lordships' opinion the error which has appeared has been in the treatment of these two separate cases

(1) (1891) I. L. R. 15 Mad. 284. (2) (1884) I. L. R. 8 Mad. 249.

(3) (1897) I. L. R. 21 Mad. 47. (4) (1899) P. L. R. 23 Mad. 47.

(5) (1886) I. L. R. 10 Mad. 1.

as governed by analogical principle. Running through the decisions of the Madras Courts the same difficulty more than once appears : it arises from the same cause, namely, that the law of the Palayam is treated as the same as the law of the Karnam. This is carried to the point that in 1902 in the case of *Gunnaiyan v. Kamakchi Ayyar* (1), the Full Court reversed the law that had been laid down by a Madras Full Bench in 1884 in the case of *Venkata v. Rama* (2). This procedure has been, of course, full of perplexity and that perplexity must now, if possible, be brought to an end.

The judgment of this Board dealing so fully with the case of a palayam tenure and delivered by Sir John Edge in the case of *Naicker v. Midnapore Zamindary Company* (3) on the 16th March, 1921, makes it unnecessary to enter again at length on that topic. The Palayagars were originally "petty chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent." The State policy with regard to Palayagars was definitely announced by the proclamation of Lord Clive in 1801. To all intents and purposes the Palayagars were relieved of military duties ; they had to give up possession of fire-arms and weapons of offence and become zamindars ; a certain number of pikemen whose names were to be registered were allowed to these chieftains in deference to their personal feelings and "for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars." The meaning of the proclamation is that their estates were subjected to assessment "upon the principles of zamindar tenures." Palayagars so treated were dealt with as zamindars with hereditary estates, their ancestors' possessions being secured to them.

It is accordingly not to be wondered at that when a case of this nature was brought before the Courts as in *Narayana v. Chengalamma* (4) already referred to, it should have been held that the Inam title-deed which had been granted to the Palayagar in that case did not confer any new title and that the enfranchisement had no "larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service." The decision forms no authority for the same principle being extended to the case of a Karnam. It was so interpreted, however, in *Gunnaiyan v. Kamakchi Ayyar* (1) and

P. C.

1921.

Jagannadha

v.

Veerabhadrayya.

Lord Shaw.

(1) (1902) 1. L. R. 26 Mad. 339.

(2) (1884) 1. L. R. 8 Mad. 249.

(3) (1921) 34 C. L. J. 5.

(4) (1886) 1. L. R. 10 Mad 1.

P. C.

1921.

Jagannadha

Veerabhadrayya.

Lord Shaw.

Bhashyam Ayyangar, J., applied the law as laid down as to Palayams as "law bearing upon the enfranchisement of Inams whether they be personal Inams or service Inams." The only difference, said the learned Judge, between that case and the present one "is that in the former the office itself was abolished as unnecessary, whereas in the present case the office was retained an office, the house being attached thereto in lieu of the Inam. This, of course, can make no distinction in principle."

Their Lordships differ from this view. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a zamindar. It is different with regard to the case of a Karnam. A hereditary right in a Karnam or his family can only, at the utmost, be said to constitute a certain *species* among persons within the area of selection of those eligible for the office. But it is not, as had already been observed, even so limited. The power of selection rests with the administrative officials, who alone are Judges of the eligibility of the Karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands followed the office, *ex necessitate*. Otherwise the holder of the lands might be some person other than the holder of the office as already pointed out. The analogy fails.

It was, however, decided in the opposite sense by a Full Bench in the case of *Pingala Lakshmi pathi v. Bommi reddipalli Chalamayya* (1). In a brief opinion it is said that "it is difficult to gather any definite principle common to the majority" in the case of *Venkata v. Rama* (2). The case of *Gunnaiyan v. Kamakchi Ayyar* (3) was approved. Their Lordships are of opinion that the Full Bench was in error that the case of a Karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata v. Rama* (2) by the Full Court. The reasons for their Lordships' views have already been sufficiently stated.

To quote and to adopt the judgment of the 25th August, 1902, of Mr. Galléti, Acting Sub-Collector, in this case:—

"This is a suit for the recovery of the Karnam service Inam lands of Pandalaka. Plaintiff is admittedly Karnam. The land is admitted Karnam's Inam. Judgment for plaintiff with costs."

A warrant of execution dated the 24th October, 1902, authorising the removal of "any person bound by the decree who may refuse to vacate the same," was also right. It is unnecessary, however, to

(1) (1907) I. L. R. 30 Mad. 434. (2) (1884) I. L. R. 8 Mad. 349.

(3) (1902) I. L. R. 26 Mad. 339.

enter upon questions either of limitation or of *res judicata*, which were referred to in the argument because the case has been disposed of on the merits.

When, accordingly, on the 21st March, 1906, the title deed already quoted was granted by way of an Inam to the appellant's father and was in express words confirmed to him, and was, "now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper," the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward by way of defence to the present suit.

Their Lordships will humbly advise His Majesty that the appeal should be allowed; that the decree of the Temporary Subordinate Judge of Cocanada dated the 14th March, 1917, be affirmed and that the appellant be found entitled to costs in the Courts below from the said date and of the costs of this appeal.

A. P. P.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Buckland.*

JOGOBONDHU PAI

v.

RAJENDRA NATH CHATTERJEE AND OTHERS.\*

*Partition—Purchaser of son's share—Mother, if entitled to a share—Stridhan received from father, if to be deducted.*

Though a Hindu mother cannot compel a partition so long as the sons remain united, if a partition does take place between the sons, she is entitled to a share equal to that of a son in the coparcenary property, and she is entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them: *Amrita v. Manick* (1); followed. If the mother has received *stridhan* from her husband or father-in-law, its value should be deducted from

\*Appeal from Original Decree No. 65 of 1920, against the decree of Babu Rajendra Lal Sashu, Subordinate Judge of Howrah, dated the 15th August, 1920.

(1) (1900) 1. L. R. 27 Calc. 551.

P. C.

1921.

Jagannadha

Veerabhadrayya.

Lord Shaw.

CIVIL.

1921.

March, 19.

April, 10.

CIVIL.

1921.

Jogobondhu

Rajendra.

the share received on partition; but the *stridhan* received from the father of the lady should not be deducted.

A member of the family cannot by alienation of his interest, prejudice the position of another member, because no owner of property is competent, as a general rule, to convey to any person a higher right than what he himself possesses.

Appeal by the Plaintiff.

Suit for partition.

The material facts and arguments appear from the judgment of Mookerjee J.

*Babu Manmatha Nath Pal* for the Appellant.

*Babu Manmatha Nath Ray* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

April 14.

**Mookerjee, J.**—This is an appeal by the plaintiff against the preliminary decree in a suit for partition of joint properties. The subject-matter of the litigation originally belonged to one Kedernath Chatterjee, who left a widow, Thakamani Debi, and four sons, Rajendra Nath, Bidhu Bhushan, Sudhir Kumar and Akshay Kumar. On the 10th August, 1917, the plaintiff purchased from Akshay Kumar his right, title and interest in the ancestral properties. On the 8th April, 1919, the plaintiff instituted the present suit for partition of the properties in which he had become a joint owner by purchase, and claimed to be placed in separate possession of an one-fourth share after partition by metes and bounds. The widow of the original owner, who was joined as a defendant, contended that she was entitled to a share in the event of partition, and that the plaintiff was consequently not entitled to more than an one-fifth share. The Subordinate Judge has given effect to this contention and has made a decree accordingly. The substantial point which has been argued on the present appeal is that the widow is not entitled to a share, inasmuch as partition is claimed, not by one of her sons, but by the purchaser from one of them. We are of opinion that there is no foundation for this contention.

It was ruled by Mr. Justice Ameer Ali in the case of *Anrita Lal Mitra v. Manick Lal Mallick* (1), that as a Hindu mother is entitled under the law to be maintained out of the joint family property, if anything is done affecting that right, as for instance, by the sale of any particular share by any of her sons, her right comes into exis-

(1) (1906) I. L. L. 27 Calc. 351.

tence. The position of a purchaser from a son is exactly that of a son himself; he has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. This decision is precisely in point and was given twenty-one years ago. We have not been able to trace any judicial pronouncement where it has been doubted or dissented from or where an inconsistent rule has been formulated. Apart from this, it is plain that the view adopted by Mr. Justice Ameer Ali was not a new departure but purported to follow the opinion expressed by Maclean C. J. and Banerjee, J. in 1899 in the case of *Jogendra Chandra v. Fulkumari* (1). Maclean C. J. observed, no doubt with reference to an entirely different set of circumstances, that as the widow's maintenance specially as against the sons is a charge on the estate, a right *in rem* in the fullest sense, adhering to the property into whatever hands it may pass, a right convertible in the event of a partition into a right to a share equal to that of sons, it is difficult to see upon what principle a son can so deal with his share as to defeat that right of his mother. Mr. Justice Banerjee emphasised the view that as a general rule no owner of property can convey to any person a higher right than what he himself possesses, and that consequently the purchaser of joint family property from a member of a joint Hindu family must take it subject to the right of his vendor's co-sharers to demand partition and subject also to such rights of other persons (who were not strictly speaking co-sharers with the vendor at the date of the alienation) as may arise under the Hindu law upon partition. A similar view had been adopted in 1880 by a Full Bench of the Allahabad High Court in *Bilaso v. Dina Nath* (2), where it was ruled that a Hindu widow, entitled under the Mitakshara law to a proportionate share with sons, upon partition of the family estate, can claim such share, not only against the sons, but as against an auction-purchaser, at the sale, in the execution of a decree, of the right, title and interest of one of the sons in such estate, before voluntary partition. It was explained that the right the mother has is a right to participate in the property left by her husband, a latent and inchoate right of participation which becomes effective when separation takes place; in other words, she has, as Maclean C. J. put it, in the case already mentioned, a quasi contingent right which may ripen or crystallise, if and when the partition takes place. (Sir Francis Macnaghten on Considerations on Hindu Law, page 57). It would be contrary to elementary principles to hold that a right of this nature is liable to be defeated by recourse

(1) (1899) 1 L. R. 27 Cal. 77.

(2) (1880) 1 L. R. 3 All. 83.

Civil.  
1921.  
Jogobondhu  
v.  
Rajendra.  
Mookerjee, J.

## CIVIL

1921.

Jogobendhu

Rajendra,

Mookerjee, 9.

to the device of an alienation, by one of the sons, of his share in the ancestral estate. The same doctrine was substantially recognised by Colvile C.J. in 1855 in the case of *Suryamani Dossee v. Dinabandhu Mallik* (1), when he said that the rights of a co-parcener in an undivided family may, in his life time, pass to strangers, either by alienation, or, as in the case of creditors, by operation of law, but in all cases those who come in, in the place of the original co-sharer, by inheritance, assignment or operation of law, can take only his rights as they stand, including of course the right to call for a partition. The view we take is not affected by the decision in *Barahi v. Debhamini* (2) which is an authority for the proposition that as the share allotted to a mother on a partition between her sons is given to her in lieu of or by way of provision for her maintenance, (*Sorolah v. Bhobun* (3); *Hemangini v. Kedar Nath* (4)) she is not entitled to a share, if a portion only of the joint property is divided and the bulk of the property, ample for her maintenance, remains undivided.

It has been contended, however, that the decision in *Amrita Lal v. Manicklal* (5) is opposed to the text of the Dayabhaga, which provides as follows in Chapter III section 2, para 29 "When partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother; for the text (of Vrihaspati) expresses, the mother should be made an equal sharer". This passage has been treated as authority for what must now be deemed settled law, namely, that the mother's right to claim a share arises, only when her sons come to a partition, in other words, that she cannot enforce her claim to a share so long as her sons remain joint and do not ask for partition: *Ganesh Dutt v. Jewach Thakoorain*, (6). Now it has been argued by the appellant that under this text of the Dayabhaga, strictly constructed, the mother is entitled to a share, only when her sons make a partition, and that, consequently, if a partition takes place at the instance of the purchaser of the share of a son, the mother cannot obtain a share. This mode of interpretation is manifestly fallacious and proves too much; for it may as well be maintained that the purchaser of a share of a son cannot at all maintain a suit for partition, inasmuch as such a suit is not explicitly authorised by the text of the Dayabhaga. The truth is that the author of the Dayabhaga had before him the

(1) (1855) Boulton's 233; 6 M. I. A. 539.

(2) (1892) I. L. R. 20 Calc. 682.

(3) (1883) I. L. R. 15 Calc. 292.

(4) (1889) L. R. 16 I. A. 115; I. L. R. 16 Calc. 758.

(5) (1900) I. L. R. 27 Calc. 551.

(6) (1903) L. R. 31 I. A. 10 (15); I. L. R. 31 Calc. 262 (271).



CIVIL

1927.

Jogobondhu

Rajendra.

Mookerjee, J.

problem of the partition of the family estate at the instance of a member thereof; he did not deal with the question of partition enforced by a stranger, who, by his purchase, becomes a joint owner of the family property but not a member of the joint family itself; a partition at his instance cannot, by any stretch of language, be called Dayabhaga or partition of heritage, and must consequently be regarded as foreign to the proper scope of the treatise of Jimutavahana. When partition of the family properties is claimed in such circumstances by a stranger to the family, the questions which arise must accordingly be determined by reference to general principles not inconsistent with those formulated for the case of partition enforced by a coparcener in the joint family. One of such general principles, as we have already explained, is that a member of the family cannot by alienation of his interest, prejudice the position of another member, because no owner of property is competent, as a general rule, to convey to any person a higher right than what he himself possesses. The substance of the matter thus is that although the text of the Dayabhaga Chapter III, section 2, para. 29 speaks only of a partition made by sons and the allotment thereupon of a share to the mother, there is nothing said in the passage or in any other authoritative text of Hindu Law which we have been able to discover, as to the mother's right to a share on partition being so absolutely non-existent before partition, that it may be defeated by any of her sons alienating his share before a partition. Apart from this, it is plain that the literal and restrictive construction of the passage of the Dayabhaga, as interpreted by the appellant, would lead to the obviously unreasonable conclusion that if the suit were instituted by one of the sons, the mother would be entitled to a share, even though one of the defendants happened to be the purchaser of the share of another son, while the mother would not be entitled to a share if the suit happened to be instituted by such purchaser himself; surely the rights of the mother could not, on any rational ground, be made dependent upon a purely accidental circumstance, namely, whether the purchaser of the share of one of her sons is plaintiff or defendant. We hold accordingly that though a mother cannot compel a partition so long as the sons remain united, if a partition does take place between the sons, she is entitled to a share equal to that of a son in the coparcenary property, and she is entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them. The share of the plaintiff has consequently been correctly determined to be one-fifth.

CIVIL

1921.

Jogobondhu

v.

Rajendra.

Mookerjee, J.

A subordinate point which has been argued before us requires consideration. The plaintiff alleged in the plaint that the lady had been given by her husband Government Promissory Notes of the value of Rs. 8,000 and that she was consequently not entitled to put forward a claim for maintenance. In his deposition, the plaintiff asserted that the lady had got from her husband G. P. Notes worth Rs. 5,000. The lady admitted that her husband gave her G. P. Notes of the value of Rs. 1,500, and that her father gave her G. P. Notes of the value of Rs. 3,500. The Subordinate Judge has believed her statement and has directed that at the time of partition the value of her allotment would be the value of one-fifth share of the estate minus the value of the G. P. Notes she received from her husband, of which the nominal value is Rs. 1,500. The appellant has contended before this Court that this direction is erroneous, that no distinction should have been made between the G. P. Notes received from her husband and those received from her father, and that the value of her allotment should be the value of one-fifth share of the estate minus the actual value of the G. P. Notes for Rs. 5,000. We are of opinion that this contention should not prevail. It is well settled that if the mother has received *stridhan* from her husband or father-in-law, its value should be deducted from her share. Mr. Justice Macpherson held in *Jodoo-nath v. Brojonath* (1) that on partition of the family property by the sons after their father's death, their mother is entitled to a share equal to that of a son, but if she has, before the partition, received property from their father either by gift or will, amounting to more than a son's share, she is entitled to nothing more on partition; if, on the other hand, she has received less, she is entitled on partition to as much as will make what she has received equal to a son's share. Reference was made to a text of Yajnavalkya where a share is allotted, in the case of a partition in the father's lifetime, to such wives as have had no separate property given to them by their husband or father-in-law. Reliance was also placed upon the *Dayabhaga*, Chap. III, section 2, Para. 31 and *Jagannath's Digest* tr. by Colebrooke, Book V, section 2, Pl. 87. This view was approved in *Kishorimohan v. Monimohun* (2) and also receives support from the decision in *Poorendra v. Hemangini* (3) which followed *Jugomohan v. Sarodamoyee* (4). The rule is stated in similar terms in para. 587 of the latest edition of the *Vyavastha Darpana* of Syamacharan Sarkar (3rd Ed. 1883, Pt. I, P. 517): "the equal participation, however, of the mother with her sons takes effect, if no separate property have been

(1) (1874) 12 B. L. R. 385.

(2) (1908) I. L. R. 12 Calc. 165.

(3) (1885) I. L. R. 36 Calc. 75.

(4) (1877) I. L. R. 3 Calc. 149.

given her by her husband or any of his kinsmen; but, if any have been so given, she is to have *ardha*, or a portion which together with the *stridhan* will be equal to a son's share." This statement is amply supported by the authorities set out in para. 238 (p. 199) and para. 552 (p. 488). It is thus indisputable that the approved opinion is that the deduction to be allowed is in respect of *stridhan* received from the husband, from the father-in-law, and possibly also from any of the kinsmen of the husband; it does not include *stridhan* received from the family of the father of the lady. This position is eminently reasonable; the primary responsibility for maintenance rests upon the husband and the father-in-law, and gifts made by them may well be set off against the share of the family estate receivable in lieu of maintenance, on the occasion of a partition amongst her sons; the same theory cannot be predicated in respect of gifts received from her father and members of his family who are not primarily responsible for her maintenance. We accordingly hold that the plaintiff is not entitled to impose on the lady a further reduction in respect of the G. P. Notes received by her from her father.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at ten gold mohurs.

Buckland, J.— I agree.

A. T. M.

*Appeal dismissed.*

*Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice,  
and Sir Ernest Edward Fletcher, Knight, Judge.*

RAJA KRISTO DAS LAW AND OTHERS

v.

ABDUL KARIM AND OTHERS.\*

*Burden of proof—Diluvion—Rent, abatement of—Diluvion, extent of.*

As soon as the fact of diluvion has been established by a tenant, if there be no express agreement to the contrary, in a case arising before the Bengal Tenancy

\* Appeals from Appellate Decrees Nos. 513, 566 to 595, of 1916, against the decrees of Babu Ananda Kisor Datta Roy, Subordinate Judge of Noakhali, dated the 30th September, 1915, reversing that of Babu Jamini Kanta Mookerjee, Munsiff of Feni, dated the 28th August, 1914.

CIVIL.

1921.

Jogobondhu

v.

Rajendra.

Mookerjee, J.

CIVIL.

1920.

August, 5.

## CIVIL.

1920.

Raja Kristo Das  
Abdul Karim.

Act came into force, the tenant is entitled to abatement of rent : *Sheikh Enayut-ullah v. Shaikh Elaheebuksh* (1) and *Salimullah v. Kaliprosunno* (2); and the burden thereupon shifted to the landlord to prove the reduced amount of rent justly recoverable by him; which could be done only by proof of the extent of the diluvion : *Goparund v. Lalla Gobind* (3) and *Surendra v. Dina Nath* (4).

Appeal by the Plaintiffs.

Suits for rent.

The material facts appear from the judgment of the learned Chief Justice.

*Babus Mohendra Nath Roy, Norendra Chandra Bose and Satyendra Nath Mitter* for the Appellants.

*Dr. Sarat Chandra Basak, Babus Ram Doyal Dey and Bhagirath Chandra Das* for the Respondents.

*Babu Biraj Mohan Majumdar* for the Deputy Registrar.

The judgments of the Court were as follows :

August, 5.

**Mookerjee, A. C. J.**—These thirty-one appeals have been preferred by the plaintiffs in as many suits for rent, which were divided into two groups in the Courts below. One group consisted of six suits which have given rise to appeals Nos. 513, and 566 to 570. The other group comprised twenty-five suits which have led up to appeals Nos. 571 to 595. The questions which require decision in the two groups of appeals are different and may be briefly indicated. In the first group of suits, the plaintiffs claimed rent on the basis of written contracts, antecedent to the Bengal Tenancy Act. The defendants claimed abatement of rent on the ground that during the years for which rent was claimed, a considerable portion of the lands of the tenancy had diluviated. In the second group of suits, the plaintiffs claimed rent at increased rates, also on the basis of similar written contracts of tenancy, on the ground that the tenants were in possession of excess lands. It may be added that as there was no express provision in the rent Acts which preceded the Bengal Tenancy Act, for assessment of rent on additional lands it was usual to insert in contracts of tenancy provisions for that purpose.

As regards the first set of appeals, the grievance of the landlords is that their claims have not been decreed in full, although as appears from the judgment of the Subordinate Judge, the tenants failed to establish the exact quantity of land which had been diluviated in the case of each tenancy during each of the years for which rent was claimed. The judgment of the Subordinate Judge seems at first

(1) (1864) W. R. Gap. No. Act X, Rul. 42. (2) (1915) 22 C. L. J. 569.

(3) (1869) 12 W. R. 109.

(4) (1915) I. L. R. 43 Calc. 354.

sight open to criticism; but on close examination it is plain that he has adopted the only course open to him, in the circumstances we shall presently explain. The plaintiffs came into Court on the allegation that they were entitled to rent at the annual amounts specified in the contracts of tenancy, for the lands held by the tenants; the quantity of land in the occupation of the tenant in each suit was set out in the plaint. The plaintiffs did not disclose that the lands were situated on the side of a large navigable river and were subject to diluvion. The defendants pleaded that the lands were subject to diluvion and that, during the years for which rent was claimed, considerable portions of the lands had in fact been diluviated. They supported this allegation by evidence which, though generally trustworthy, was not absolutely reliable as to the exact quantity diluviated each year from each holding. The contention of the landlords appellants is that the burden lay upon the defendants to establish, not merely that there was diluvion but also the precise quantity of land diluviated each year, and as they had failed to furnish accurate proof in this respect, they were not entitled to abatement of rent. We are of opinion that this contention cannot be sustained.

The defendants have established by evidence of a conclusive character that there was diluvion during each of the years in suit and in respect of each of the tenancies. This in fact was not seriously controverted by the plaintiffs. As soon as this was established, the inference became irresistible, that the plaintiffs had put forward a claim which was, in part, at least, exaggerated. The appellants have not explained how, under these circumstances, the Court can be compelled to make a decree in their favour for the entire sum claimed by them, although the Court is convinced that the claim is exaggerated. We are of opinion that as soon as the fact of diluvion had been established, it followed that, as there was no express agreement to the contrary, the tenants were entitled to abatement of rent [*Sheikh Enayutollah v. Sheikh Elaheebuksh* (1); *Salimullah v. Kaliprosunno* (2)], and the burden thereupon shifted to the landlords plaintiffs to prove the reduced amount of rent justly recoverable by them, which could be done, only by proof of the extent of the diluvion. This view is supported by the decisions in *Goparund v. Lalla Gobind* (3), and *Surendra v. Din Nath* (4). In the case before us, the plaintiffs have undoubtedly withheld evidence in their possession which would have assisted the Court in the determination of

CIVIL.

1920.

Raja Kristo Das

Abdul Karim.

Mookerjee, A. C. J.

(1) (1864) W. R., Cap. No. Act X Rule 42. (2) (1915) 22 C. L. J. 569.

(3) (1869) 12 W. R. 109.

(4) (1915) I. L. R. 43 Cal. 554.

CIVIL.

1920.

Raja Kristo Das

Abdul Karim.

Mookerjee, A. C. J.

this question. In such circumstances, the Subordinate Judge followed the only course open to him, namely, to make a decree in favour of the plaintiffs according to the admission in the written statement of the defendants. The case is analogous to what frequently happens in suits for rent where neither the plaintiff nor the defendant is able to prove the rate of rent respectively alleged by him; the Court thereupon makes a decree in favour of the plaintiff according to the admission of the defendant. We are of opinion that the judgment of the Subordinate Judge is substantially correct and his decree must be affirmed.

As regards the second set of appeals, it is plain that there is no ground which can be successfully urged in view of the stringent provisions of the law which regulate second appeals to this Court. The question in controversy related to the standard of measurement at the inception of the tenancy, which was stated to be the length of the hand of one Mr. Courjon. The Subordinate Judge has found on the evidence that this unit of measurement was  $19\frac{1}{4}$  inches long instead of 18 inches which is the measure of the standard cubit. This finding cannot possibly be assailed in second appeal; and if it remains untouched, it cannot be disputed, as it was not disputed in the Courts below, that the defendants are not in possession of excess area assessable with additional rent. On this ground, the decrees in the second set of appeals must be affirmed.

Our attention, however, has been drawn to the concluding portion of the judgment of the Subordinate Judge where he has made a declaration that the length of the standard cubit of measurement in Parganas Bedrabad and Amirabad is  $19\frac{1}{4}$  inches. The plaintiffs did not ask for such a declaration in their plaint, nor did the defendants urge that such a declaration should be made in their favour. It is plain that the Subordinate Judge should not have made such a declaration, which must, in consequence, be expunged from the decree.

Subject to this variation, the appeals will stand dismissed, with costs wherever the respondents have entered appearance.

Fletcher, J.—I agree.

A. T. M.

*Appeals dismissed. Decrees modified.*

# APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and  
Sir Ernest Edward Fletcher, Knight, Judge.

HARI SING NEHAL CHAND

KANKINARAH CO., LD.\*

Civil.

1920.

June, 23, 24.  
July, 1.

*Arbitration—Regularity of form; observance of—Principle of justice—Arbitrator receiving information from one side—Presence of both sides necessary—procedure—Misconduct vitiating an award—Indian irregularities in Arbitration (Act IX of 1899), Secs. 13 (1), 14—Award, when remitted—Award, when set aside—Court differing on merits of dispute between parties.*

Although a Court should not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard: *Andrews v. Mitchell* (1). Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case: *Harvey v. Shelton* (2). One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents.

In arbitration proceedings both sides must be heard, and each in the presence of the other; however immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent.

It is indisputable to the impartial administration of justice between the parties that both should be present when proof is being led by either: the same rule applies to an inspection or an experimental test which are regarded as practical proof: *Paterson & Son v. Corporation of Glasgow* (3).

If irregularities in procedure are proved which amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator: *Amir Begam v. Khwaja Saiyed Badruddin* (4).

Courts have been invested with statutory authority to remit an award only in comparatively recent times.

The Court may remit an award when an arbitrator has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the Court will not remit the award. But where the

\*Appeal from Original Order No. 62 of 1920, against the order of Mr. Justice Rankin, dated the 12th April, 1920.

(1) (1905) A. C. 78 (80). (2) (1844) 7 Beav. 45 (462).

(3) (1901) 3 F. 34, 38 Scots L. R. 855.

(4) (1914) 39 C. L. J. 494; I. L. R. 36 All. 335.

CIVIL.

1920.

Hari Slog

Kankinarah Co., Ltd.

arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened inspite of a complete absence of dishonest motive, the Court will not hesitate to remit the award to the arbitrator instead of setting it aside.

An arbitrator is the Judge chosen by the parties; he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside, merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision.

Appeal by the Petitioners.

In the matter of an application to set aside an award.

The material facts appear from the judgment of

April, 12.

**Rankin J.**—This is an application by the sellers under a contract dated 28th August 1919, No. 12223 for sale of 5000 bales of jute of a mark which I will call the Naraingunge mark. The application is to set aside an award of the Bengal Chamber of Commerce, dated 26th November 1919 and filed on 20th January 1920. The applicant's counsel has taken a single point which is that the award ought to be set aside on the ground that the arbitrators have so conducted themselves as to amount in law to misconduct in their handling of the case. One-half of the contract quantity of the goods was to be of mark 2 and another half was to be of mark 3. Arbitration was claimed by the buyers on the 11th September 1919, in respect of 1275 bales of the mark 3 goods. By the 11th September 1919 this parcel had been already delivered to the buyer who complained as to quality, and, not electing to reject, claimed an allowance. The sellers at first maintained that they had received no complaint. It appears that the complaint had been made to their broker and it was repeated to the sellers on 22nd September. On the 21st October the sellers delayed sending in their reply to the buyer's case on the ground that they were in negotiation with the buyers and on the 25th the buyers retorted that the negotiations were at an end. The sellers finally put forward their case on the 29th October. They agreed with the buyers that the arbitrators should be shippers. They said that the goods were up to the standard of the mark, and they asked that if they were held wrong in this they should be given a chance to replace the goods instead of having to pay an allowance. They also wanted the arbitration to comprise another parcel of 1219 bales of the same mark about which under the same contract complaint was being made by this time. Accompanying their case is some copy correspondence with the



buyers, which contains a good deal of evidence that the sellers were desirous of procrastinating with the arbitration of 1275 bales and were anxious to get the subsequent dispute as to the other parcel included in the same arbitration. The buyers' case in reply is dated 31st October. On the 6th November the Registrar of the Chamber of Commerce sent a notice to the parties requesting each in conjunction with the other to select ten bales, five bales to be selected by the sellers and stating that should the sellers refuse or neglect to select their five bales in time to enable the buyers to send them in by 1 o'clock on the 8th November, the buyers were to be at liberty to select the whole ten bales themselves. It appears that on the 7th November two persons on behalf of the sellers went to the mills, ostensibly at all events to make the selection, Babu Purna Chandra Chopra (who is said to be in Bikaner and who has made no affidavit before me) and one Krishnamull, a Gomasta of the seller. At the godown they were met by Mr. James Christie & Sons, other persons representing the buyers. On the 7th November the sellers wrote the two following letters to the Registrar :—

"With reference to your letter No. 21914 dated the 6th instant, we are to submit to the Court which have been constituted to adjudicate on the above dispute that our representatives went to select bales, out of the lot of 1275 bales, as advised by the Court, and they found only a mixed lot containing about 150 to 200 parcels of the mark in dispute. They politely but persistently requested the mills authorities to show them the lot of 1275 bales in dispute which they refused and failed to do; thus they were not in a position to select bales as required by the Court. In the circumstances we would submit to the Court to postpone the arbitration for the present and to find out the lot in dispute so that we can select the bales for their inspection. In spite of our this submission to the Court, it proceeds with the arbitration, we would not be bound by the Court's award which will be based on inadequate and one-sided evidence."

The second letter is :—

"In continuation of our letter of date we would further submit to the Court that our buyers are also dissatisfied with the balance 1291 bales of threes as they informed us in their letter No. 3504 dated 7th October 1919 to proceed with the arbitration on both the lots which we again hereby respectfully insist on the Court to do."

Then it gives a series of reasons on account of which the sellers contend that the two matters should be dealt with in one arbitration.

With regard to the first letter it will be observed that the phrase used is "they found only a mixed lot containing about

CIVIL.

1926.

Hari Sing

Kahnarrah Co. Ltd.

Rankin, J.

CIVIL.

1920.

Hari Sing

Kankinarah Co. Ltd.

Ranjan, J.

150 to 200 bales of the mark in dispute" and that the second letter shows pretty clearly that the sellers are playing for time. On the same date (7th November) the buyers wrote to the Registrar:—

"In acknowledging receipt of your letter No. 21915-C of 6th instant we beg to advise you that as Messrs. Harising Nehal Chand have refused to select bales for arbitration ex the parcel in dispute we have exercised the authority granted as in your letter under reply and have to-day despatched 10 bales of our own selection to the Chamber for favour of arbitration."

The answer given by the Tribunal is contained in a letter of 14th November to the seller.

"With reference to your letters of 7th November I am directed by the Court which has been constituted to adjudicate on this dispute to say that they will proceed with the arbitration on 1275 bales as applied for by Messrs. Jardine Skinner & Co., Managing Agents, Kankinarah Company, Limited. I am directed to give you notice to identify, on or before 2 p.m. to-morrow Saturday the 15th November, the 10 bales which have been sent here by Messrs. Jardine Skinner & Co., from the parcel in dispute, failing which the bales will be inspected for purposes of the arbitration."

Immediately upon receipt of that letter from the Tribunal the sellers wrote withdrawing from the case (15th November).

"We request very much that the Court constituted to adjudicate on this so called dispute has, as we find, not listened to our most reasonable and business-like submission to it in our letters of the 7th. Further neither you nor the said Court has adduced any reason whatsoever to set aside our just and legitimate prayers and to abide by the buyer's demands. We respectfully protest against such arbitrary procedure of the Court and we decline to be a party to the case which please note."

Mr. Mitter appearing on behalf of the sellers contended that the arbitrators have been guilty in law of misconduct on the ground that they have not really tried the seller's case, that they have simply brushed aside or ignored their statement that they were not given an opportunity to select five bales. Mr. Pugh argued on the other hand that under the rule the arbitrators were not obliged to hear oral evidence that there was no request to be allowed to call such evidence, and that the arbitrators could and did decide on the letters and other documents before them. He pointed out that they saw the ten bales selected by the buyers and have found that they were fully representative of the parcel. As the sellers withdrew from the case by the letter of 15th November the whole case of misconduct

against the arbitrators must clearly rest on the Registrar's letters of 14th. The first question that arises in my mind is as to how much the letter of the 14th means? The first part of this letter appears to be directed against the seller's effort to postpone this arbitration so as to bring in a further dispute arising as to 1219 bales after arbitration had been demanded as to the 1275 bales. The second part of the letter, as I read it, does not necessarily mean more than this, that the arbitrators are not satisfied at that stage that there was any sufficient reason for staying their hands or stopping the proceedings, and that they were desirous that the ten bales selected by the buyers should be identified and at all events inspected by them before they proceeded to deal with any of the questions which were involved in the case. If that is all that is meant by the letter of 14th November then it is clear that there could be no question of misconduct. It is quite certain that the arbitrators were not obliged, merely because they were asked by the letter of 7th November, to grant any further adjournment than had in fact taken place by the time the letter of the 14th November was written. The other view however is that the meaning of the letter of the 14th November is that the arbitrators were of opinion that the sellers' complaint in the matter as regards the selection of sample was unfounded. I think myself that in such a matter one ought to be most careful not to read into this pronouncement of the tribunal anything more than is actually stated in it. I think it shows that the arbitrators were desirous of seeing the ten bales before making up their minds any further in the case and that they were determined for the present at all events not to stop the proceedings until they had seen them. If on the other hand the true view is that the arbitrators had considered upon inspection of the bales and upon the documents the question whether the seller's complaint was justified and that they intended to hold against the sellers I think that there was material before the arbitrators upon which they were entitled so to hold and that they have not gone outside their powers under the Rules. It has to be observed that it was the seller's duty to go and select, and unless they were hampered or hindered in this by the buyers they had no complaint. The letter of 7th November was obviously suspected for the reason that it was an effort to obtain delay on the part of a person against whom an arbitration was being called and who had made previous efforts for delay. It was however particularly fishy in the way in which it intended to suggest that only 150 to 200 bales of this parcel were present in the mill's godown. The arbitrators know, or are supposed to know, how bales

CIVIL.

1920.

Hari Singh

v.  
Kankinarah Co. Ltd.

Rankiw,

CIVIL.

1920.

Hari Sing,

Kankisarrah Co. Ltd.

Rankin, J.

of this sort are stocked in tiers in godowns and how samples are usually selected. From the previous correspondence, from what the letters of 7th November say, from the way in which the seller's letter was framed, and from what it curiously omitted to say, I think the arbitrators were entitled to find on the 14th November, that they were satisfied of the hollowness of the seller's suggestion, that he was unable to take a fair sample of five bales from the parcel in dispute. It has to be observed that what was asked by the letter of the 7th was that the arbitration might be postponed; there was no request to hear oral evidence; no written statement of individual witnesses was sent with the letter. The matter was mixed up with another question the object of which was delay, and the letter wound up by telling the arbitrators that if they did not grant the postponement the sellers would repudiate the arbitration. I think that the arbitrators are not in so unhappy a position that they must either allow themselves to be bullied in this way or else must be held guilty of misconduct. In the affidavits before me a good deal of embroidery upon what was originally alleged in the letter of 7th November can be observed. The only affidavit from the sellers that is in evidence at all as to what happened on the 7th is the affidavit of Krishnamull and when I look at paragraphs 5 and 7 of the affidavit of Krishnamull they convince me that the whole attempt of the seller is to make something out of nothing. These goods are heavy goods stocked in tiers. The seller's representatives saw the marks on 200 or so of the outside bales. Nobody in his right mind would want to examine and identify every bale and it was no part of the buyer's duty to assist in such intention. I think that the arbitrators, although they did not have the same evidence that I have, had sufficient to enable them to act. I think they came to a conclusion that was warranted by the materials before them and confirmed by the materials before me.

The application will be dismissed with costs.

Against this order, the petitioners appealed.

*Sir B. C. Mitter* and *Mr. Pearson* for the Appellant.

*Mr. W. Gregory* for the Respondents.

The judgments of the Court were as follows:

**Mookerjee A. C. J.**—This is an appeal against the judgment of Mr. Justice Rankin in the matter of an application to set aside an award.

On the 28th August 1919, the appellants agreed to sell to the respondents 5000 bales of jute of what has been called the Narain-

July, 1.

ganj mark. The Contract contained an arbitration clause in the following terms :

"Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce whose decision shall be accepted as final and binding on both parties to this contract."

The case for the appellants is that between the 1st and 30th September, 1919, they delivered to the buyers 2494 bales of jute of the contract mark assortment and quality, which were received by them. The buyers were apparently not satisfied with the quality of the jute and on the 11th September, 1919, referred the matter to the arbitrators without any notice to the plaintiffs. On the 17th September 1919, the Registrar of the Arbitration Tribunal of the Chamber intimated to the appellants the objection taken by the buyers. On the next day, the appellants replied that they had received no complaint from the buyers and denied that there was any case for arbitration. After some correspondence, not material for the decision of the questions raised in this appeal the Registrar sent the following letter to the appellants on the 6th November, 1919 :

"I am instructed by the Court which has been constituted to adjudicate on the above dispute to request you to select in conjunction with Messrs. Jardine Skinner & Co. Managing Agents, Kankinarrah Co. Ltd., ten bales from the 1275 bales in dispute, five bales to be selected by yourselves and five bales by Messrs. Jardine Skinner & Co. The bales must be here at 10 o'clock on Saturday the 8th instant. Should you refuse or neglect to select your portion of the bales in time to enable Messrs. Jardine Skinner & Co. to send them here on the day and at the hour mentioned, Messrs. Jardine Skinner & Co. have been informed that they will be at liberty to select the whole ten bales themselves and send them here. You may identify the bales here at 10-30 A.M. on that day."

On the next day, the sellers replied as follows : "With reference to your letter No. 21914 dated the 6th instant, we are to submit to the Court which have been constituted to adjudicate on the above dispute that our representatives went to select bales out of the lot of 1275 bales, as advised by the Court, and they found only a mixed lot containing about 150 to 200 bales of the mark in dispute. They politely but persistently requested the mills authorities to show them the lot of 1275 bales in dispute which they refused and failed to do ; thus they were not in a position to select bales as required by the Court. In the circumstances we would submit to the Court to postpone the arbitration for the present and to find out the lot in dispute so that

CIVIL

1920.

Hari Sing

Kankinarrah Co. Ltd.

Mookerjee, A. C. J.

CIVIL

1920.

Hari Sing

Kankinarah Co. Ltd.

Mookerjee, A. C. J.

we can select the bales for their inspection. In spite of our this submission to the Court, it proceeds with the arbitration, we would not be bound by the Court's award which will be based on inadequate and one-sided evidence."

It appears that on the 6th November, 1919, the Registrar had also sent a letter to the buyers in the following terms :

"I am instructed by the Court which has been constituted to adjudicate on the above dispute to request you to select, in conjunction with Messrs. Harising Nehal Chand, ten bales from the 1275 bales in dispute, five bales to be selected by yourselves and five bales by Messrs. Harising Nehal Chand. The bales must be here at 10 o'clock on Saturday next the 8th instant. Should Messrs. Harising Nehal Chand refuse or neglect to select their portion of the bales in time to enable you to send them here on the day and at the hour mentioned, you will be at liberty to select the whole ten bales yourselves and send them here."

To this, the buyers replied next day as follows :

"In acknowledging receipt of your letter No. 21915 C of 6th instant we beg to advise you that as Messrs. Harising Nehal Chand have refused to select bales for arbitration ex the parcel in dispute, we have exercised the authority granted us in your letter under reply and have to-day despatched 10 bales of our own selecting to the Chamber for favour of arbitration."

It now transpires that the arbitrators did not communicate to the buyers the reply received from the sellers on the 7th November, 1919, in which they alleged that they could not make the selection as directed by the arbitrators, as they were not allowed by the buyers to have access to the 1275 bales. Nor did the arbitrators communicate to the sellers the reply received from the buyers. On the other hand, they accepted the 10 bales selected by the buyers and called upon the sellers on the 14th November, 1919, to identify them ;

"I am directed to give you notice to identify, on or before 2 P.M. to-morrow Saturday the 15th November, the ten bales which have been sent here by Messrs. Jardine Skinner & Co., from the parcel in dispute, failing which the bales will be inspected for purposes of the arbitration."

The sellers protested against this procedure and declined to be a party to the arbitration proceedings further. Ultimately, the arbitrators made an award on the 26th November, 1919, holding that the quality of the jute was not equal to the standard of the mark, and directing the sellers to pay to the buyers an allowance of Rs. 31,875 on the 1275 bales in dispute. The award was filed in Court on the

19th January, 1920. On the 16th March, 1920, the sellers made an application to have the award set aside, which has been refused by Mr. Justice Rankin. On the present appeal, we have been invited to set aside the award as improperly made. In our opinion, the award must be remitted to the arbitrators for reconsideration under section 13 (1) of the Indian Arbitration Act.

From the correspondence already set out, it appears that on the 7th November, 1919, the sellers alleged that they were unable to select five bales as directed by the arbitrators from the 1275 bales in dispute, because the sellers allowed them access to only 150 or 200 mixed bales. The buyers, on the other hand, intimated to the arbitrators that as the sellers had refused to select the bales, they had exercised the option allowed to them and had selected all the ten bales. Consequently, there was at that stage a substantial matter in controversy between the parties, namely, whether or not the conduct of the buyers made it impossible for the sellers to carry out the instructions of the arbitrators. This question should have been decided in the presence of both the parties concerned, after the respective allegations of the sellers and the buyers had been intimated, each to the other. Now it may be conceded, as stated by Lord Halsbury in *Andrews v. Mitchell* (1), that although we must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice, as Lord Langdale M. R. put it in *Harvey v. Shelton* (2), must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents, though the rule has sometimes been ignored by mercantile arbitrators, whose awards have on this ground been set aside: *Matson v. Trower* (3); *In re Brook and Delcomyn* (4); *In re Camillo Eitzan and Jewson & Sons* (5).

The validity of the proceedings in this case must consequently be tested in the light of the well-established doctrine that in arbitration proceedings both sides must be heard, and each in the presence of the other; however immaterial the arbitrator may deem a

CIVIL.

1920

v. Hari Sing

Kankinarah Co. Ltd.

Mookerjee, A. C. J.

(1) (1905) A. C. 78 (80).

(2) (1844) 7 Beav. 455 (462).

(3) (1824) Ry &amp; M. 17.

(5) (1896) 40 Sol. Jou. 439.

(4) (1864) 16 C. B. N. S. 403.

CIVIL.

1920.

Hari Sing

Kankinarah Co. Ltd.

Mookerjee, A. C. J.

point, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. This rule was formulated by Lord Eldon in *Walker v. Frohisher* (1), where he set aside an award on the ground that the evidence had been improperly admitted, and observed that even though the arbitrator swore that the evidence received had had no effect on his award, no Court would permit him to decide so delicate a matter as whether a witness examined in the absence of one of the parties had an influence on him or not. The same view was adopted by Lord Denman in *Dobson v. Groves* (2), and in *Re Plews & Middleton* (3). In *Drew v. Drew* (4), Lord Cranworth followed the rule, laying down that an arbitrator misconceives his duty if he, in any the minutest respect, takes it upon himself to listen to evidence behind the back of a party who is interested in controverting it or is entitled to controvert it. Lord Eldon and Lord Cranworth thus concurred in the view that the principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence if he can that shall meet and answer it. It is indeed indispensable to the impartial administration of justice between the parties that both should be present when proof is being led by either; the same rule applies to an inspection or an experimental test which are regarded as practical proof: *Patersson & Son v. Corporation of Glasgow* (5). It is both an unwise and unsafe proceeding for an arbitrator to take proof in the absence of either or both parties. These rules have been adopted and applied in *Cursetji v. Crowder* (6) and *Ganes Narayan v. Malida Koer* (7). In the present case, the arbitrators decided of their own motion, to adopt a certain method to obtain a fair sample of the disputed goods. It is conceivable that they might have adopted some other method equally convenient or efficacious; but this much is clear that they could not arbitrarily depart from the procedure they had invited the parties to follow. Now, one of the parties complained that they had been prevented by the other party from making the selection in the manner directed by the arbitrators. The arbitrators did not investigate the matter. Their conclusion that the buyers had rightly exercised the option to select all the

(1) (1801) 6 Ves. 70.

(2) (1844) 6 Q. B. 637.

(3) (1845) 6 Q. B. 845.

(4) (1855) 2 Macqueen 1.

(5) (1901) 3 F. 34; 38 Scots L. R. 855.

(6) (1894) 1 L. R. 18 Bom. 299.

(7) (1911) 15 C. L. J. 399.



ten bales was arrived at ex parte, without intimation to the sellers that the buyers claimed this right and without opportunity afforded to them to controvert the allegation of the buyers. This plainly affects the validity of the award, because, as pointed out by Lord Parmoor in *Amir Begum v. Khwaja Saiyed Badruddin* (1), if irregularities in procedure are proved which amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator.

The question next arises whether the award should be remitted under section 13 (1) or should be set aside under section 14 of the Indian Arbitration Act. The appellants have urged that the award should be set aside and the matters in controversy investigated in Court. We are unable to accept this contention in the circumstances of the present case. There can be no doubt that the Court may remit the award where the arbitrator has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive, the Court will not hesitate to remit the award to the arbitrator instead of setting it aside. This is in accord with the course adopted in *Auning v. Hartley* (2) and *Davenport v. Vickery* (3) and with the opinion expressed by Romilly M. R. in *Re Tidswell* (4). In this connection, it is important to bear in mind that Courts have been invested with statutory authority to remit an award, only in comparatively recent times, as is clear from section 8 of the Common Law Procedure Act, 1854; even the Arbitration Act (Scotland) 1894, did not embody a corresponding provision; consequently, in many of the earlier decisions on the subject, orders were made for cancellation of the award under circumstances in which, in more recent times, the award would have been probably only remitted to the arbitrators. To take one example, when an award was remitted by the Lord Ord-

CIVIL.

1920.

Hari Sing

Kankinarah Co. Ltd.

Mookerjee, A. C. J.

(1) (1914) 19 C. L. J. 494; 18 C. W. N. 755; J. L. R. 36; All. 336.

(2) (1858) 27 L. J. Ex. 143.

(3) (1861) 9 W. R. (Eng) 701.

(4) (1863) 33 Beav. 213; 140 R. R. 94.

CIVIL.

1926.

Hari Sing

Kankinarah Co. Ltd.

Mookerjee, A. C. J.

nary (Lord McLaren) in *Rogerson v. Rogerson* (1), the Court of Session (Lords Mure, Shand and Adam) set aside the order; see also *Pollick v. Heatley* (2) and the decisions of the House of Lords in *Adams v. G. N. Scotland Ry Co.* (3); *Holmes Oil Co. v. Pumphreton Oil Co.* (4); *Edinburgh Water Trust v. Clippens Oil Co.* (5). In the present case, the Court has authority either to set aside the award or to remit it to the arbitrators; the sole question is, which of these alternatives should be adopted. Although the procedure followed by the arbitrators was, as we have held, irregular, there is no suggestion that they acted as they did, from corrupt or improper motives. The appellants are, in view of the unfavourable result of the arbitration, naturally anxious to escape from the tribunal of their choice; but that is no reason why the Court should assist them to achieve that purpose. An arbitrator is the Judge chosen by the parties; he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside, merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision; as Lord Halsbury said in *Holmes Oil Co. v. Pumphreton Oil Co.* (4) "the parties have agreed that his award shall not be subject to the ordinary mode of appeal and that it shall be final; that is, in nine cases out of ten, the very object which they mean to attain by submitting their differences to arbitration." This purpose should not be lightly defeated, merely because, in the course of the arbitration the arbitrator had failed to comply with what Lord Watson called in *Adams v. G. N. Scotland Ry Co.* (3) "any one of the express conditions contained in the contract of submission; or any one of those important conditions which the law implies in every submission." [See also *Sharpe v. Bickerdye* (6)]. The position is manifestly otherwise when the proceedings indicate that the arbitrator has been guilty of corruption, bribery or falsehood; but the case before us does not fall within that category.

The result is that this appeal is allowed, the order made by Mr. Justice Rankin set aside and the award remitted to the arbitrators for reconsideration with reference to the point whether the

(1) (1885) 12 Rottie 583; 22 Scots L. R. 376.

(2) (1910) 47 Scots L. R. 402.

(3) (1890) 18 Rottie 1; 28 Scots L. R. 579.

(4) (1891) 18 Rottie 52; 28 Scots L. R. 940.

(5) (1902) 4 F. 40; 39 Scots L. R. 860.

(6) (1815) 3 Dow. 102.

samples were or were not properly drawn. The costs of this appeal will abide the result ; this, however, does not affect the order for costs thrown away by the adjournment of the appeal on the 23rd June last.

**Fletcher, J.**—I agree.

*Messrs. Pugh & Co* : Attorneys for the Appellants.

*Messrs. Orr, Dignam & Co* : Attorneys for the Respondents.

A. T. M.

*Appeal allowed : Award remitted.*

CIVIL.

1920.

*Hari Sing*

*Kankinardh Co. Ltd.*

*Mookerjee, A. G. J.*

## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Mr. Justice Ghose.*

RAJANI KANTA SHAHA

*v.*

IDRIS THAKUR AND ANOTHER.\*

CRIMINAL.

1921.

*April, 8, 1921.*

*Prosecution.—Withdrawal from—Criminal Procedure Code (Act V of 1898), Sec. 494, order under, effect of—Charges, addition of—Criminal Procedure Code, Secs. 226, 227—Penal Code (Act XLV of 1860), Secs. 497, 498.*

An order by which the Court acting under section 424 of the Code of Criminal Procedure, accords consent to the withdrawal from a prosecution, is a judicial order and for every such order the reasons should be given so that High Court acting in its Revisional Jurisdiction may be in a position to examine into the matter and determine whether the discretion vested in the Court has been properly exercised : *Umesh v. Satish* (1) followed.

The Court of Sessions may add charges under sections 497 and 498 of the Indian Penal Code, in the manner indicated in section 226 and the following sections of the Code of Criminal Procedure, when the complaint of the husband was not merely of offences involving the use of force but was also a specific complaint of the offence punishable under the aforesaid sections of the Penal Code.

Application for Revision under section 435 of the Code of Criminal Procedure by the Complainant.

The accused were charged with the commission of offences punishable under sections 366 and 344 of the Indian Penal Code.

\* Criminal Revision No. 27 of 1921, against the order of the Sessions Judge of Mymensingh, dated the 15th December, 1920.

(1) (1917) 22 C. W. N. 69.

CRIMINAL.

1951

Rajani

Idris Thakur.

They were acquitted under the provisions of section 494 clause (b) of the Code of Criminal Procedure.

*Babu Gopal Chandra Das* (for *Babu Nalin Chandra Paul*) for the petitioner.

*Babu Debendra Nath Bhattacharjee* for the Crown

*Babu Atindra Nath Mukerji* for the Accused.

C. A. V.

The judgment of the Court was at follows :

April, 12.

This Rule is directed against an order of acquittal made under the provisions of section 494 clause (b) of the Code of Criminal Procedure.

The accused opposite party one Idris Thakur & one Abila Bewa were committed to the Court of Sessions to take their trial on charges of the commission of offences punishable under sections 366 and 344 of the Indian Penal Code. Idris Thakur is a Mahomedan while the woman Ujjalmani whom he is alleged to have abducted and confined is said to be the lawfully married wife of a Hindu neighbour Rajani Kanta Shaha.

When the case came on for trial the Public Prosecutor, acting under the instructions of the District Magistrate, applied for permission to withdraw from the prosecution. The Sessions Judge gave his consent and thereupon followed the acquittal now in question.

For his order giving consent to the withdrawal from the prosecution, the learned Sessions Judge has recorded no reasons.

Now in the case of *Umesh Chunder Roy v. Satish Chunder Roy* (x) it has been held by a Divisional Bench of this Court, that an order, by which the Court acting under section 494 of the Code, accords consent to the withdrawal from a prosecution, is a judicial order and that for every such order the reasons should be given so that this Court acting in its revisional jurisdiction may be in a position to examine into the matter and determine whether the discretion vested in the Court has been properly exercised.

In the present case however we may assume that the reason influencing the learned Sessions Judge was that put forward by the Public Prosecutor in his application namely that "the evidence of force is wanting."

Before accepting and acting upon this reason the learned Sessions Judge should have examined the commitment record for himself.

The order of commitment and the record in fact disclose the presence of evidence relating to the use of force. It would be improper for us at this stage to assess the value of that evidence. It is sufficient to say that there is evidence fit for the consideration of a jury.

Moreover in the present case there is a further reason for holding that the Sessions Judge's discretion has been improperly exercised. The husband's complaint was not merely of offences involving the use of force but was also a specific complaint of the offence punishable under sections 407 and 408 of the Indian Penal Code. There was therefore nothing to prevent the addition of charges under the aforesaid sections, and the Sessions Judge should therefore have proceeded in the manner indicated in section 226 and the following sections of the Code of Criminal Procedure.

For these reasons we set aside the order of the Sessions Judge granting consent to the Public Prosecutor's withdrawal from the prosecution in question, and the consequent order of acquittal. The accused will now be replaced upon their trial and the case against them heard and disposed of in accordance with law.

*Acquittal order set aside and retrial ordered.*

*Before Mrs. Justice Tandon and Mr. Justice Ghose.*

**ASHUTOSH DAS**

**KING-EMPEROR**

*Evidence; admissibility of—Statements made to Police Officers—Corroboration.*

And certain other persons committed dacoity at a certain place. A gave

evidence in a proceeding under section 110 read with section 118 of the Code of

Criminal Procedure to the effect that he had made over the stolen things of

dacoity to the accused.

*Held, that the evidence was admissible.*

The evidence of Police officers with regard to statements made to them by

certain persons is inadmissible.

Criminal Revision No. 98 of 1921, against the order of the district Magis-

trate of Bankura, dated the 13th December, 1920.

CRIMINAL.

1921.

April, 8.

Rajani

Idris Thakur.

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CRIMINAL.

1921.

Ashutosh

King-Emperor.

Statement made to the investigating Police officer by a relative of a person whose property was stolen, can be used to contradict or corroborate as the case may be, the statement made by him in the Court of the trying Magistrate.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused were directed under section 110 read with section 118 of the Code of Criminal Procedure to execute a bond of Rs. 200 with two sureties each in like amount to be of good behaviour for one year, in default to suffer rigorous imprisonment.

*Babus Dasarathi Sanyal, Debendra Narain Bhattacharyya and Lalit Mohan Sanyal* for the Petitioner.

*Mr. Ashraf Ali* for the Crown.

The judgment of the Court was as follows :

April, 8.

In this case the accused before us has been directed under the provisions of section 110 read with section 118 Criminal Procedure Code to execute a bond of 200 Rupees with two sureties each in like amount to be of good behaviour for one year, in default to suffer rigorous imprisonment for the same period. The allegation against him was that he was by habit a receiver of stolen properties knowing the same to be stolen.

We have been taken over a considerable portion of the record and we cannot but come to the conclusion that the trial or enquiry in the present case has been vitiated by the admission of much inadmissible evidence ; for instance, a person of the name of Gayaram who says, that he and certain others committed dacoity at a place called Hirabati, gave evidence to the effect that he had made over the ornaments stolen in the course of that dacoity to the accused. That of course is admissible. He was further permitted to say that he heard from certain other persons that articles stolen in three other dacoities were also made over to the accused. His informants have not been examined. That portion of his evidence on which the Magistrate lays stress is clearly inadmissible. Then at a search of the house of the petitioner it is stated that a certain toe ring was found in his house and that toe ring, it is suggested, was one of the properties stolen in the course of a dacoity at the house of one Satis Ganguly in the village of Jagadanga. With regard to this toe ring the Police officers were permitted to state in the course of their investigation before the said Police officers the wife of Satis and the wife of his brother Sasadhar identified this toe ring as belonging to Satis's wife. Neither of these two ladies was examined. Obviously the evidence of the Police officers with

regard to the statements made to them by these two ladies is inadmissible. Further the statement supposed to have been made to the investigating Police officer by the witness Sasadhar the brother of Satis has been obviously relied upon by the Magistrate as substantive evidence against the accused, while it should have been used in order merely to contradict or corroborate as the case may be the statement made by Sasadhar in the Court of the trying Magistrate.

We next find that the statement said to have been made by a pleader of the name of Sujoy Das to the investigating Inspector has evidently been treated by the trying Magistrate as substantive evidence against the petitioner, while the statement supposed to have been made, if the Inspector was to be believed, should have been used at most in order to contradict Sujoy Das as regards the statement made by him in the Court of the trying Magistrate. With regard further to the witness Gayaram it is clear that he was a witness of whose evidence corroboration was necessary. What corroboration then is of his evidence as to what he knew of his own personal knowledge the Magistrate has not indicated. We find further that even in the evidence of the witnesses who speak to the reputation of the petitioner much hearsay evidence has been admitted.

For these reasons we must set aside the order now complained of and direct that there be a retrial of this matter in the Court of a Magistrate of the first class at the head quarters of the District of Bankura. Such Magistrate to be nominated by the District Magistrate of Bankura, and be one other than the Magistrate in whose Court the order now set aside was made.

A. T. M.

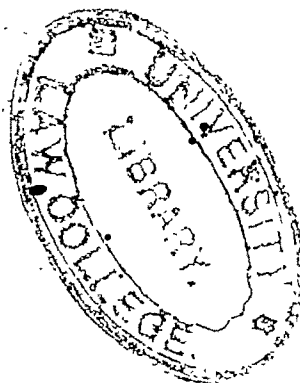
*Rule made absolute : Retrial ordered.*

CRIMINAL.

1921.

Ashutosh

King-Emperor.



## PRIVY COUNCIL.

PRESENT: Lord Buckmaster, Lord Dunedin, Lord Shaw and  
Sir John Edge.

ARUMILLI PERRAZU AND OTHERS

v.

ARUMILLI SUBBARAYADU AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

*Partition—Sudras in Madras—Adopted son and after born son—Hindu Law—  
Decision resting on discretion—Fiduciary relationships in India—Engl sh  
trustee—Dattaka Chandrika, its authority.*

The rules applicable to accounts between trustees and *certain* trusts in England do not invariably apply in their entirety to fiduciary relationships in India; *e. g.* to the case of a manager of a joint family, who, except where direct misappropriation is proved or fraudulent and improper conversion of the moneys to his personal use, is liable to account only for what he has actually received and not for what he ought to or might have received, if the moneys had been profitably dealt with.

There are fiduciary relationships in India which do not involve all the duties which are imposed upon trustees in England.

Among Sudras in Madras the adopted son shares equally with the subsequently born *Aurasa* son. The rule to that effect first propounded in the Dattaka Chandrika has been accepted and acted upon by the Hindus in Madras for over a century, and may now be regarded as established law.

Dictum in *Raja v. Subbaraya* (1) approved. *Karuturi Gopalan v. Karuturi Venkataraghavalu* (2) overruled.

The Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption, but where its propositions are not based upon authentic texts it is necessary to enquire whether they have in fact been accepted and acted upon as law.

It requires very special and unusual circumstances to induce the Privy Council to vary a decision resting on discretion, even though the view of the first appellate Court differed from that of the primary Court as to the way in which that discretion should be exercised.

Consolidated appeals by Perrazu and Ramanna from a decree of the Madras High Court, modifying a decree of the Subordinate Judge of Rajahmundry.

The facts of the case are sufficiently stated in their Lordships' judgment. The arguments on the various questions of account, which were of no general interest, are not reported. The remaining question was whether among Sudras in Madras an adopted son on partition of the family property shares equally with an after-born

(1) (1883) I. L. R. 7 Mad. 253. (2) (1915) I. L. R. 40 Mad. 632.

P. C.

1921

February, 24, 25, 28.

March, 1.

May, 5.



legitimate son. The Subordinate Judge held that he does : the High Court, (Ayling and Srinivasa Aiyangar, JJ.) that he takes a fourth only of a natural born son's share.

Hence these appeals by the Defendants.

P. C.  
1921.  
Perrazu  
v.  
Subbarayadu.

*Dunne, K. C. (Parikh and Narasimham with him)* for Appellants : The question is whether the general rule, which gives one fourth of the share of a natural born son to the adopted son when a natural son is subsequently born, applies to Sudras. We submit, on the authority of the Dattaka Chandrika, section V para. 29 that it does not, and that the adopted son takes an equal share. Respondents rely upon a text of Vasishtha cited at para. 17 of the Dattaka Chandrika, and argue that para. 29 is bad law because in conflict with that text. We submit that para. 29 merely makes an exception in the case of Sudras, and that there is good reason for the distinction. Among the three twice born castes, the adoptive son in the absence of a natural son, can offer sacrifices and perform religious duties : but such religious efficacy ceases once a natural son is born : hence the adopted son gets a less share. Among Sudras on the other hand no one can offer sacrifices, so his position is not made worse by the birth of a natural son. For the text of Dattaka Chandrika vide Stokes' Hindu Law-books, edition 1865, 659. Sir Thomas Strange's Hindu Law, Vol. I. p. 99 (edition 1830) lays down that among Sudras the afterborn son and the adopted son share equally : the author had been Chief Justice of Madras for years. Macnaghten's Hindu Law, p. 70 (edition 1865) says the same thing : at page 66 the author says that the Dattaka Chandrika and the Dattaka Mimamsa are the two leading authorities on adoption.

*Rajah v. Subbaraya* (1) was a case of representation, the adoptive son of one brother claiming against the natural son of another : but the view of Turner C. J. and Muttusami Ayyar J. at p. 254, as to the materiality of this passage of Dattaka Chandrika, on the position of Sudras, even though *obiter dictum*, is of the highest importance.

In *Baramanand Mahanti v. Chowdhri Krishnocharan Patnaik* (2) Tottenham and Norris JJ. hold that the rule restricting the share of an adoptive son is not applicable to Sudras, and cite Dattaka Chandrika as an authority.

This case was cited with approval in *Asita Mohon Ghosh v. Nirode Mohon Ghosh* (3) where passages as to the authority of Dattaka Chandrika, are collected.

(1) (1883) 1 L. R. 7 Mad. 253. (2) (1884) 14 C. L. J. 183.

(3) (1916) 20 C. W. N. 901.

P. C.  
1921.  
Pettazú  
v.  
Subbarayadu.

As to the weight to be attached to the Dattaka Chandrika, reference may be made to the following: *Rungama v. Atchama* (1); *Collector of Madura v. Mootoo Ramalinga Sathupathy* (2); *Sri Balusu Gurulingasami v. Sri Balusu Ramalakshamma* (3); *Bhagwan Singh v. Bhagwan Singh* (4); *Nagindas Bhugvandas v. Bachoo Hurkrishondas* (5).

In *Karuturi Gopalan v. Karuturi Venkataraghavulu* (6), sufficient weight has not been given to the Dattaka Chandrika: that case is wrongly decided.

[Lord Buckmaster: They do not dispute the Dattaka Chandrika as an authority, but say it is not an authority *ad hoc*: that this is a question of inheritance, as to which the Mitakshara is paramount]

It is not a question of inheritance only, but of status: the two are bound together. The learned Judges have ignored the time during which the rule of Dattaka Chandrika has been accepted. That rule is not in conflict with the Mitakshara, which does not deal at all with the case of Sudras: rather, the Dattaka Chandrika itself assumes and comments on the Mitakshara.

*Parikh* followed: The general rule is that the adopted son is on the same footing as the natural born. We are not seeking to establish an exception but to limit one. Of the cases relied on in *Karuturi Gopalan v. Karuturi Venkataraghavulu* (6) none is the case of a Sudra: the Bombay case was reversed by this Board *Nagindas v. Bachoo* (5).

*De Gruyther K. C. (Eddis with him)* for Respondents: The Dayabhaga in Bengal and the Mitakshara elsewhere, though originally commentaries, are now the law, and you cannot upset them by saying they conflict with a text of Smriti. The Dattaka Chandrika cannot deviate from or add to the Mitakshara. The latter work cites Vasishtha at Chapter I section XI para 24: it lays down clearly without any exception that the adopted son takes a fourth only if a legitimate son be afterwards born (vide Stokes' Hindu Law-books, p 420). In this very same chapter Sudras are mentioned at para 41: there is no other special rule of succession provided for them; except for that rule, the ordinary law applied.

There are numerous other works dealing with the subject—Smriti

(1) (1836) 4 M. L. A. 1. (2) (1868) 12 M. L. A. 397.

(3) (1899) L. R. 26 I. A. 113 (131); I. L. R. 22 Mad. 398; I. L. R. 21 All. 460.

(4) (1899) L. R. 26. I. A. 153; I. L. R. 21 All. 412.

(5) (1915) L. R. 43 I. A. 56; I. L. R. 40 Bom. 270; 23 C. L. J. 395.

(6) (1915) I. L. R. 40 Mad. 632 (635).

Chandrika, Sarasvati Vilasa, Dayabhaga, Viramitrodaya—but none of them excepts Sudras, or gives the rule laid down in Dattaka Chandrika.

The question has arisen out of a text of Gautama, which is never referred to in the Mitakshara, but which is cited in the Dattaka Mimansa and Dattaka Chandrika. The author of the Dattaka Mimansa construes it as referring to a virtuous adopted son and a bad natural one: the author of the Dattaka Chandrika applies it to Sudras.

The authority either of the Dattaka Chandrika or of the Dattaka Mimansa is not high. In *Ganga Sabai v. Lekhraj Singh* (1) Mahmood J. considered himself entitled to refer to other works as to the authority of the Mimansa, and concluded that very little weight was due to it. The Board's view appears from *Sri Balusu Gurulingasami v. Sri Balusu Ramalashmamma* (2). In that case the Board held that the adoption of an only son was good, though the Dattaka Mimansa and the Dattaka Chandrika had in terms provided that it was bad. They also laid down that the Chandrika was merely a work by a learned man. West and Buhler's disparaging opinion of the Chandrika is at page 131. In *Pattu Lal v. Parbati Kumvar* (3) the definite prohibition by the Dattaka Mimansa of the adoption by a widow of her brother's son was disregarded. The Board lay down that caution is necessary in adopting Nanda Pandita's glosses. The point is plain, that neither the Mimansa nor the Chandrika is law *ad hoc*.

The Chandrika arrives at this particular rule, which is quite contrary to the Mitakshara, by arguing from the analogy of the illegitimate son. The text of Vridha Gautama, which it cites cannot be traced, and I submit that the view of the Chandrika is based not on any old text, but on the author's view that it is unfair that the illegitimate son should get a full share (as he does among Sudras) and the adoptive son only a fourth share.

There is a well grounded tradition that the Dattaka Chandrika was written to support a case of Raja Nobokissen's; as to this *vide* J. N. Ghose's Hindu Law, p. 667, and Golap Chandra Sarkar's Hindu Law of Adoption, p. 124. Sarkar points out that Jagannatha in his Digest never mentions Dattaka Chandrika.

[*Lord Dunedin*: It is important to consider the course of decisions and practice in Madras during the last fifty years].

There has never been any suggestion of practice. The only Judi-

(1) (1886) 1. L. R. 2 All 253 (322).

(2) (1899) L. R. 26 I. A. 113 (129, 131).

(3) (1915) L. R. 42 I. A. 155 (161); 1. L. R. 37 All. 359; 22 C. L. J. 190.

P. C.

1921.

Perrazu

v.

Subbarayadu.

P. C.

1921.

Perrazu

Subbarayadu.

cial decision is the dictum in *Raja v. Subbaraya* (1). The earliest case, *Ayyavu Muppanar v. Niladakhi Ammal* (2) was apparently a Sudra case and there are two others, of Sudras, one in Calcutta, *Raghabanund v. Sadhu Charan* (4) and one in Bombay, *Giriapa v. Ningapa* (5), where Sudras got one-fourth. It cannot be said there is a steady course of authorities even in Madras. Mandlik, West and Buhler, and Siromani all take my view. The Dattaka Chandrika itself states the rule as a deduction—as its author's view of what the law should be. Strange and Macnaghten merely repeat the Dattaka Chandrika.

*Dunne, K. C.*, replied. The Dattaka Chandrika has a precise text dealing with this very situation. The Board has never laid down that the Mitakshara is to supersede the Dattaka Chandrika; and the Mitakshara is in fact silent on this particular matter.

[*Lord Dunedin* : It is not a wild assumption that if the law were different in the case of Sudras, the Mitakshara would say so].

The Mitakshara is merely a commentary on Yajnavalkya; it must not be taken as the law. The commentator here cites a text of Vasishta : he does not explain it, nor does he say it is a rule of general application extending to Sudras.

The theory about the Dattaka Chandrika being a forgery was set aside by Banerji, J. in *Bhagwan Singh v. Bhagwan Singh* (5). He had before him all that G. C. Sarkar had said on the subject. His dissenting judgment was upheld by this Board on appeal.

The text of Vriddha Gautama cited in the Dattaka Chandrika is also, with the exception of a single letter which is different, cited in the Mimansa : the difference is discussed in *Asita Mohon Ghosh v. Nirode Mohon Ghosh* (6) where the Calcutta High Court held that the Chandrika's version was correct.

In the cases where Sudras only got a fourth the point that the law was different in the case of Sudras from the other castes was never raised.

Their Lordships' judgment was delivered by

May, 5.

**Sir John Edge.**—These appeals raise a question of great and far-reaching importance with regard to the rights of succession in the Presidency of Madras, but this is associated with a series of relatively unimportant matters relating to questions of accounts that have arisen in these circumstances.

(1) (1883) I. L. R. 7 Mad. 253.

(2) (1862) 1 Mad. H. C. R. 45.

(3) (1878) I. L. R. 4 Calc. 425.

(4) (1892) I. L. R. 17 Bom. 100.

(5) (1895) I. L. R. 17 All. 294 (313).

(6) (1916) 20 C. W. N. 901.

The first plaintiff in the suit, who is the first respondent to each appeal, was the manager for many years of a joint family estate which appears greatly to have prospered under his care. Distrust, however, arose, and was apparently well justified, as to his dealing with certain portions of the estate, and elaborate enquiries were set on foot outside the Courts for the purpose of ascertaining what the true position was. This first respondent—uneasy, it is asserted, as to the prospect of proceedings being brought against him as the result of these enquiries—instituted proceedings himself, to which the appellants were parties, alleging that they also had been in custody of part of the joint family estate, and asking for accounts and consequential relief, to which demand among other answers, a claim was put forward that the plaintiff should render an account of the joint family properties and his management from 1898 onwards. The questions associated with these claims have been before the Subordinate Judge and before the High Court. Both these Courts refused the claim for the general account and decided the various questions in issue that were raised on the accounts. Apart from the dispute as to the rights of succession, the claim for the general account and the following items only are the subject of these consolidated appeals: First, the appellants say that the plaintiff should pay interest at 9 per cent. on the moneys misapplied in accordance with the direction of the Subordinate Judge, this direction being overruled by the High Court, who reduced it to 6 per cent.; secondly, they assert that the High Court was wrong in deciding that certain items of Schedule B and Schedule C of the Supplemental Schedule B were the joint property of the family; and finally they assert that the High Court was wrong in excluding from the items on which interest was payable a sum of Rs. 7,000, which was the subject of a promissory note held by the plaintiff.

With regard to the claim for the general account, this has been refused by both Courts. The High Court based their decision upon the ground that all the items in respect of which the plaintiff was alleged to have been guilty of misconduct had been investigated and set out in the schedules which were before the consideration of the learned Judge, who had dealt with them item by item as appeared in his judgment. They continue in these words:—

“What more could be done, even if we direct general accounts, it is difficult to see.”

Their Lordships are entirely in agreement with this view. The learned Subordinate Judge himself stated that it appeared that all possible items of collection by the first plaintiff had been proved as

P. C.

1921.

Perrazu

v.

Subbaraya du.

Sir John Edge.

P. C.

1921.

Perraju

Subbarayadu.

Sir John Edge.

far as possible by the indefatigable energy of the defendants 1 and 3. He also added that he thought delay was a good reason for refusing the claim. Their Lordships think that the High Court rightly interpreted the judgment of the Subordinate Judge, and that in substance, if not in actual words, both Courts have decided that in effect the account asked for has already been taken and that it would be a needless prolongation of litigation and waste of cost if a further account were ordered. This conclusion is the one at which their Lordships have themselves arrived, and they therefore think that upon this point the appeal must fail.

With regard to the interest, the matter can be briefly dealt with. The High Court have considered that 6 per cent. simple interest is sufficient. It would require very special and unusual circumstances to induce this Board to vary such a decision, which rests upon discretion, even though in this matter the view of the High Court differed from that of the Subordinate Judge as to the way in which that discretion should be exercised. But they may add that if the matter were one upon which an independent judgment was required, they think that the judgment of the High Court was correct.

As to the items claimed by some of the defendants as separate property this depends upon evidence and the Courts have differed as to its effect. Their Lordships think that the judgment of the High Court is correct as to its interpretation. The first defendant asserts that the property was bought with moneys belonging to his wife, and he accounts for these moneys by stating :—

“ My mother-in-law gave property to my wife just before her death. My wife told me of her gift of property to her. I was not present at the time.”

And this is supported by the evidence of the defendant's brother-in-law, whose evidence is in these terms :—

“ My sister sold away her husband's properties to which she succeeded. No ; she obtained 4 acres from her husband's family for maintenance. She also purchased 10 acres. Subsequently she sold away all the 14 acres of land.”

The wife was not examined to support the claim. It appears that the learned Subordinate Judge based his judgment upon the view that there was nothing improbable in the defendant's wife having inherited the amount necessary for the purchase of the property. That would be a potent reason if there were substantial evidence to show that such inheritance had in fact been acquired. In their Lordships' opinion such evidence is not forthcoming, and

they think upon this point also the judgment of the High Court is correct, though it is liable to be misunderstood from the form of the judgment, which suggests as a reason that the first defendant's story was contradicted by one of his own witnesses whose evidence was inadmissible. This would apparently leave the first defendant's story unchallenged, but in truth his account was never sufficiently substantiated, and for this reason that claim fails.

With regard to the last matter of the Rs. 7,000, it is extremely difficult to extract the reasons why the High Court dealt with this sum differently from other amounts which appear in the same account, though in fact it was added as an additional item. There is, however, nothing to show their Lordships that it was so dealt with by the first plaintiff as to render him liable to account for anything more than the actual interest that he received upon it ; but to this extent he is accountable.

Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestuis que* trusts that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply. This does not mean that breach of established duty should be less severely dealt with in India than in this country, but that there are, fiduciary relationships which do not involve all the duties which are imposed upon trustees here. The office of manager of a joint family estate affords an illustration of this difference. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with. Their Lordships cannot find in this case anything to render the first respondent liable beyond the extent to which they have referred. On this point also, except to the extent above mentioned, the appellants fail.

The next question which it is necessary to consider is that which is raised by the second of these two consolidated appeals in which the defendants Arumilili Rammanna and his three sons, Arumilli Ragavudu, Arumilli Venkattratnan and Arumilli Subbarayadu are the appellants, and the plaintiffs are the respondents. The parties are Sudras and belong to a family of Sudras, of the Presidency of Madras, which in general is governed by the law of the Mitakshara.

P. C.  
1921.  
Perrazu  
v.  
Subbarayadu.  
Sir John Edge.

P. C.

1921

Perrazu

Subbarayadu.

Sir John Edge.

- Arumilli Rammanna was, as has been concurrently found by the Courts below, adopted by the plaintiff, Subbarayadu, as his son when that plaintiff was childless. Rammanna was by birth a son of Venkiah, who was a brother of that plaintiff. After Rammanna had been adopted that plaintiff's sons, Ramamurti and Periah, who are respectively the second and third plaintiffs, were born, and the question to be considered in the second of these two appeals is whether in the Sudra caste in the Presidency of Madras an adopted son on partition of the family property shares equally with a son of his adopted father born subsequently to his adoption. The question is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text.

So far as ancient texts and recognised Sanskrit commentaries on Hindu law are concerned, the earliest authority for the proposition that amongst Sudras an adopted son, on a partition of the property of the joint family, shares equally with a legitimate son of the adoptive father, born subsequently to the adoption, is that of the Dattaka Chandrika. In Section V of the Dattaka Chandrika ("Hindu Law Books" edited by Whitely Stokes, 1865) which deals with "the succession by inheritance of adopted sons lineally and collaterally," the commentator, after referring to rights of members of a Hindu joint family generally to share in a partition of the family property, said :—

"29. The mode, however, of partition between the son of the wife, the son given, and the rest and the legitimate son, which has been propounded in what preceded, does not apply to the Sudra tribe."

After some further observations, the commentator further said :—

"32. Accordingly, the text subjoined must be construed as referring merely to Sudras. 'A son given being thus adopted, if by any chance, a legitimate son should be born let them be equal partakers of the father's estate.' So also in the following text, the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares of the other sons likewise is subsequently declared by the sentence ('if there be an hundred son') occurring therein. 'For a Sudra is ordained a wife, of his own class and no other. Those begotten on her shall have equal shares; if there be an hundred sons (the same mode of partition shall obtain). If the sentence in question be referred to the



real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning." For those statements as to the right amongst Sudras of the adopted son to share equally on partition with the subsequently born legitimate son of the adoptive father, the author of the Dattaka Chandrika did not state who his authority was. He quoted a text from Vriddha Gautama to the effect that an adopted son and an after-born son share equally, which is not accepted by the Courts in India or by the followers of the Mitakshara or by the followers of the Dayabhaga as a correct statement of the law applicable to all Hindus, and drew his inference that it was applicable to Sudras from texts which do not propound any such proposition, and so far as their lordships understand them, do not suggest the conclusion expressed on this subject by that commentator.

The Dattaka Chandrika has been treated by the Board as a high authority. As early as 1846 Lord Kingsdown, then Mr. Pemberton Leigh, in delivering the judgment of the Board in *Rungama v. Atchama and others* ( ) in reference to the Dattaka Chandrika and the Dattaka Mimansa, said :—" They are written on the particular subject of adoption ; they enjoy, as we understand, the highest reputation throughout India."

In *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2) which was an appeal from the High Court at Madras, Sir James Colville, in delivering the judgment of the Board, referring to the Dattaka Mimansa and the Dattaka Chandrika, said :—" Again, of the Dattaka Mimansa of Nanda Pandita, and the Dattaka Chandrika of Davanda Bhatta, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India ; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Province of Mithila and Benares."

It has since then been ascertained that Davanda Bhatta was not the author of the Dattaka Chandrika. Sir James Colville, in the passage above quoted, was referring to the authority of the work itself.

In *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (3) which was an appeal from the High Court at Madras, Lord Hobhouse in delivering the judgment of a Board consisting of himself, Lord Macnaghten and Sir Richard Couch, said, " The

(1) (1846) 4 M. I. A. 12 (97). (2) (1868) 12 M. I. A. 397 (437).

(3) (1899) L. R. 26 I. A. 113 (131).

P. C.  
1921.  
Perrazu  
v.  
Subbarayadu.  
Sir John Edge.

P. C.  
 1921.  
 Perazu  
 9.  
 Subbarayadu.  
 Str John Edge.

date of the Dattaka Chandrika is not certain; but it is at all events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West & Buhler in their valuable work on Hindu law, 3rd ed., p. 11, speak thus: 'The Dattaka Mimansa and the Dattaka Chandrika, the latter less than the former are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance but that they may be set aside on general grounds in case they are opposed to the doctrines of the Vyavahara Mayukha or the Dharmasindhu and Nirayasindhu.' This is spoken with special reference to Bombay and Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

In *Bhagwan Singh v. Bhagwan Singh* (1) which was an appeal from the High Court at Allahabad, Lord Hobhouse in delivering the judgment of a Board consisting of himself, Lord Macnaghten, Lord Morris and Sir Richard Couch, in referring to the Dattaka Mimansa and the Dattaka Chandrika said: "If there were anything to show that in the Benares School of law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on Smritis as the source from whence all Schools of Hindu Law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: 'The Dattaka Mimansa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based.' Both works have been received in Courts of law, including this Board, as high authority. Lord Kingsdown's words in *Rungama v. Atchama* (2) have already been quoted and those of Sir James Colville in the case of *the Collector, of Madura v. Moottoo Ramalinga Sathu*

(1) (1899) L. R. 26 I. A. 153 (161).

(2) (1846) 4 M. I. A. 1.

*pathy* (i). As has been said, Sir James Colville quotes with assent the opinion of Sir William Macnaghten that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern jurists while the Mimansa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Southerland, and of West and Buhler, seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law."

There can be no doubt that the Dattaka Chandrika has been for long and still is accepted in the Presidency of Madras as a treatise on adoption of the highest authority. It is not primarily a work dealing with rights of inheritance or with rights of coparcenary in property acquired by birth or adoption, but it does necessarily deal with such subjects as the occasion requires. It is not known who was the author of the Dattaka Chandrika, and the doubt as to its authorship makes it impossible to fix with any certainty the date when it was written, but it is believed to be an earlier work than the Dattaka Mimansa, which was written by Nanda Pandita, who is known to have lived about 300 years ago. When the Dattaka Chandrika was first accepted in Southern India as an authority on the law of adoption, it would probably be impossible now to ascertain. It, however, appears to their Lordships that it does not necessarily follow from the fact that the Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption that comments and propositions, apparently then novel, contained in it, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of the Hindu law. It thus becomes necessary to ascertain, if possible, whether the rule propounded for the first time, it is, believed, in paragraphs 29 and 32 of section 5 of the Dattaka Chandrika, which have been quoted above, ever was accepted and acted upon by the Hindus of the Presidency of Madras as Hindu law.

Mr. W. Macnaghten in his "Principles and Precedents of Hindu Law," which was published at Calcutta in 1829 and is a recognised authority on Hindu Law, said at p. 70 of Volume I: "Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together, but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doc-

(1) (1868) 12 M. L. A. 397.

P. C.

1921.

Perrazu

Subbarayadu.

Sir John Edge.

P. C.

1921.

Perrazu

v.

Subbarayadu.

Sir John Edge.

trine of other Schools." In a note to that passage, Macnaghten stated: "It is laid down in the Dattaka-Chandrika that in the case of Sudras, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son, and this rule prevails accordingly in the Southern Provinces."

• It has been suggested, in reference to his note which has been quoted, that Mr. William Macnaghten, when he wrote his book, had no special knowledge of the law affecting sudras in the Presidency of Madras, but even if that suggestion is well founded, it cannot be suggested that Sir Thomas Strange, when he wrote his well-known book on Hindu Law, which was published in 1830, did not know what was the then accepted law in the Presidency of Madras as to the rights of an adopted son amongst Sudras. Sir Thomas Strange had been Chief Justice of Nova Scotia; he commenced his judicial experience in India in 1798 when he was appointed Recorder of Madras, and became a celebrated Indian jurist. He was Chief Justice of the Supreme Court at Madras from 1800 until 1817. At page 99 of Volume I of his "Hindu Law" in reference to the right of inheriting on the death of a Hindu father, Sir Thomas Strange stated:—"Among Sudras, in the same event (the death of the father), the after-born son and the adopted son share equally the paternal estate." That statement was doubtless based on the text of the Dattaka Chandrika which has been quoted. Sir Thomas Strange knew that according to Hindu law as applicable to the twice-born classes, the share to which an adopted son would be entitled on partition would be less than the share of the legitimate son born to the adoptive father subsequently to the adoption, and he would not have stated that amongst Sudras those sons would take equal shares if from his judicial experience in Madras he had any doubt that the rule propounded in the Dattaka Chandrika had not been accepted and acted upon in the Presidency of Madras.

The earliest reported case in the Presidency of Madras, so far as their Lordships are aware, in which this question as to the right amongst Sudras of the adopted son to share equally in the property of a joint family with the subsequently born legitimate son of the adoptive father was mentioned, came on appeal before the High Court at Madras in 1883. In that case [*Raja and another v. Subbaraya* (1)], the plaintiff sued for partition and to recover from the defendant one-half of certain movable and immovable properties on the ground that he was an adopted son of the deceased undivided

(1) (1883) I. L. R. 7 Mad. 253.

brother of the deceased father of the defendant. The parties were Sudras, and the defendant contended that the plaintiff was entitled to one-fifth only of the estate, and that he, the defendant, was entitled to four-fifths under the Hindu law. In that case Turner, C. J., and Muttuswami Ayyar, J., on appeal, delivered the following judgment :—

"There is no valid ground for the contention that if the adoption be proved the plaintiff should take but a fifth share. By representation the adopted son takes the share which his adoptive father would be entitled to take on partition. With all deference to the authority of the High Court of Calcutta in *Raghubanund Doss v. Sadhu Churn Doss* (1), we doubt whether the passage in *Dattaka Chandrika*, section 5, paragraph 25, even with the addition suggested, has been correctly interpreted. If there be such a special rule, as is suggested, it is not applicable at all events to Sudras, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption. We agree with the Judge that the plaintiff would take his father's share, a moiety, if he were really adopted."

It has been objected, and correctly, that the dictum in that case that amongst Sudras an adopted son is entitled to take an equal share on partition with a legitimate son born subsequently to the adoption, was not necessary to the decision of the appeal then before the Madras Court, and that the opinion on that subject expressed by Turner, C. J., and Muttuswami Ayyar, J., must be regarded as *obiter*. Nevertheless it was the opinion of the then Chief Justice of Madras, who was an able and careful lawyer, and of Mr. Justice Muttuswami Ayyar, who was a member of a Brahmin family of the Madras Presidency, and who earned for himself the well-deserved reputation of being one of the most accomplished and reliable lawyers in India in cases involving a knowledge of Hindu law. That opinion of those learned Judges, although strictly it was an *obiter dictum*, was deserving of respect, and was probably expressed in answer to some argument of counsel in the case. If the rule propounded in the *Dattaka Chandrika* that amongst Sudras the adopted son and the subsequently born legitimate son shared equally had been seriously questioned in the Presidency of Madras, it is impossible to believe that Mr. Justice Muttuswami Ayyar should in 1883 not have been aware that the rule had not been accepted and acted upon in that Presidency as correct.

The next reported case relating to Sudras in the Madras Presi-

P. C.

1921.

Periazu

Subbarayadu.

Sir John Edge

(1) (1878) 1. L. R. 4 Calc. 425.

P. C.  
 1931.  
 Peruzzi  
 v.  
 Subbarayadu.  
 Sir John Edge.

dency, of which their Lordships are aware in which the rule in question here of the Dattaka Chandrika was considered, is that of *Karuturi Gopalan v. Karuturi Venkataraghavulu* (1), which came on appeal before the High Court at Madras in 1915. In that case the parties were Sudras, and the plaintiff, who was the respondent to the appeal, had been adopted in 1898 by one Venkana, a Sudra, who died in 1902 leaving him surviving the plaintiff, the first defendant, who was the legitimate son of Venkana, born to him subsequently to the adoption of the plaintiff, and his widow, who was the natural mother of the first defendant, and was the second defendant. During the minority of the plaintiff and the first defendant, the widow managed the estate. The plaintiff attained majority in 1907, and brought the suit in 1910 for partition and delivery to him of half of the family estate, alleged mismanagement of the estate by the widow, and misappropriation by her of portions of the estate for the benefit of the first defendant, and claimed an account. The first defendant, through his mother as his guardian, pleaded, amongst other things which are not material to the question to be considered here, that the plaintiff, as an adopted son, was entitled only to a fifth share of the estate, and that he, the first defendant, was entitled to the remaining four-fifths. The suit was tried by A. Sambamurti Ayyar, a Hindu, the then Subordinate Judge of Rajahmundry, who decreed to the plaintiffs a half share in all the family properties and finding that there had been malversation of the estate by the second defendant for the benefit of the first defendant, made a decree for restitution.

It is to be observed that the learned Hindu Subordinate Judge, who tried that suit in or after 1911, must have believed that in the Presidency of Madras the rule of the Dattaka Chandrika, that amongst Sudras an adopted son was entitled to share equally on a partition with the subsequently born legitimate son of the adoptive father, was the rule to be applied in the Presidency of Madras in cases in which the parties were Sudras. The appeal from that decree of the Subordinate Judge of Rajahmundry came before Wallis, C. J., and Seshagiri Ayyar, J., Seshagiri Ayyar, J., wrote the judgment, with which Wallis, C. J. concurred. The learned Judges of the High Court held that they were not bound by the opinion on the question of the right amongst Sudras of an adopted son to share equally with the subsequently born son of the adoptive father in the property of the joint family which had been expressed by Turner,

(1) (1915) 1. L. R. 40 Mad 632 ; 29 M. L. J. 710.

C. J., and Muttuswami Ayyar in *Raja v. Subbaraya* (1) on the ground that the opinion was *obiter* and on the ground that the attention of those learned Judges had not been drawn to the case of *Ayyavu Muppanar v. Niladatchi Ammal* (2), and having considered some ancient texts and the Mitakshara came to the conclusion that the rule propounded on this subject in the Dattaka Chandrika was not binding upon them and that the dictum based on the authority of the Dattaka Chandrika should not be followed.

As the reference in the judgment of Seshagiri Ayyar, J., in *Karuturi Gopalan v. Karuturi Venkataraghavulu* (3) to the decision in *Ayyavu Muppanar v. Niladatchi Ammal* (2) suggests that if that decision had been brought, in 1883, to the attention of Turner, C.J., and Muttuswami Ayyar, J., in *Raja v. Subbaraya* (1) they would not have expressed the opinion that amongst Sudras the adopted son is entitled to take an equal share with a legitimate son who is born subsequently to the adoption, it is necessary to consider that case. The case of *Ayyavu Muppanar v. Niladatchi Ammal* (2) came on appeal to the High Court at Madras in 1862.

The parties to the suit were Hindus, but it does not appear whether the parties were Sudras; all that is stated is that "the parties were of a class not strictly bound by the requirements of the Hindu law." Probably they were Sudras. The plaintiff had brought his suit for one-fourth of the estate of Ayyavu Muppanar, deceased; the defendant, a minor appearing through his mother as guardian, was a son of Ayyavu Muppanar, born after the adoption. The main questions considered were whether the adoption had in fact been made; whether if made it was a valid adoption; whether a son, adopted or begotten, could claim maintenance until put in possession of his share of the ancestral estate; and whether as against an adopted son suing for his share of the ancestral estate the law of limitation does not begin to run until the allotment of such share has been demanded and refused. The question as to whether the adopted son was entitled to more than one-fourth share does not appear to have been raised or considered. Strange and Frere, JJ., considered Chapter I, section XI, paragraph 24, of the Mitakshara and decided that the estate should be divided into five portions, of which the begotten son should have four and the adopted son one. The Dattaka Chandrika was not so far as appears alluded to. Even if it be assumed that the parties were Sudras their Lordships are unable to regard that case as an authority on the question which was before

P. C.

1921.

Perrazu

Subbarayadu.

Sir John Edge.

(1) (1883) 1 L. R. 7 Mad. 253.

(2) (1862) 1 Mad. H. C. R. 45.

(3) (1915) 1 L. R. 40 Mad 632.

P. C.

1921.

Perrazul

Subbarayadu.

Sir John Edge.

the High Court at Madras in *Karuturi Gopalan v. Karuturi Venkataraghavulu* (1), and which has to be considered in this appeal.

In the present case, the subject of this appeal, the suit was brought in the District Court of Godavari on the 26th November, 1909; it was transferred to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge who tried the suit was A. Sambamurti Ayyar, and he delivered his judgment in it on the 13th December, 1913. There were six issues framed, but the material question so far as the second of these appeals is concerned, relates to the share to which the adopted son and through him his sons were entitled on partition of the family property. The plaintiffs were Arumilli Subbarayadu and his two minor naturally-born sons. The defendants 1, 2, and 3 were sons of Venkiah who had been the only brother of the plaintiff Arumilli Subbarayadu; defendant 5 was a son to defendant 1; defendant 6 was a son of defendant 2; defendant 4, was the adopted son of the plaintiff Arumilli Subbarayadu, but was described in the plaint as a son of Venkiah, and defendants 7, 8 and 9 were the minor sons of defendant 4. The other defendants are immaterial so far as the second of these two consolidated appeals is concerned. In the plaint the adoption by the plaintiff Arumilli Subbarayadu of Arumilli Ramanna, defendant 4, was ignored, and it was alleged in the plaint that the "plaintiffs are entitled to a half-share in the entire family property and the defendants 1 to 9 are entitled to a half-share." In the written statement of the defendants 1, 2, 3, 5 and 6 it was alleged that the plaintiff Arumilli Subbarayadu had adopted the defendant 4, A. Ramanna, as his son in 1896. In the written statement of the defendants 4, 7, 8 and 9, who are the appellants in the second of these consolidated appeals, it was alleged that the plaintiff Arumilli Subbarayadu had adopted the defendant 4, Arumilli Ramanna, in 1896 and that as an adopted son he was entitled to an equal share along with the plaintiffs.

The fact and the validity of the adoption were disputed; but the Subordinate Judge, on the clearest evidence, found that the adoption was proved and was valid, and having so found that issue he in the thirtieth paragraph of his judgment recorded his finding as to the share in the family property which the defendant 4 as an adopted son in the Sudra family was entitled to, thus:—

"30. As regards the share to which the fourth defendant should be entitled according to law, there is practically no dispute.

(1) (1915) I. L. R. 40 Mad. 632.



The parties belong to the Sudra caste and the law is clear that amongst the Sudras the adopted son shares equally with the subsequent-born Aurasa sons [see *Raja v. Subbaraya* (2) ; *Subba v. Belachandra* (2) and *Piriaroyalu v. Royalu* (3)]. Thus the first plaintiff's branch consisting of plaintiffs 1 to 3 and the fourth defendant will have to divide amongst themselves a half share of the family property and the fourth defendant's share therein would, therefore, be one-eighth of the whole property. This is my finding on issue I (a)."

It may be mentioned that their Lordships have been unable to ascertain what was the case which the Subordinate Judge referred to as reported in "XVIII Madras, pp. 422 and 435." That judgment of the Subordinate Judge was delivered on the 13th December, 1913, and it is to be noticed that up to that date the plaintiffs do not appear to have contended that amongst Sudras an adopted son was not entitled to share on partition of the family property equally with the legitimate sons of the adoptive father born subsequently to the adoption. They apparently raised that point for the first time in their memorandum of appeal to the High Court on the 24th March, 1914. The judgment of the High Court appears to have been delivered on the 13th October, 1916. Their Lordships do not know when the appeal to the High Court in *Karuturi Gopalan v. Karuturi Venkataraghavulu* (4) was presented, but the appeal to the High Court in that case was heard in August and September, 1915. That was an appeal from a decree of the same Subordinate Judge.

The learned Judges, Ayling and Srinivasa Aiyangar, JJ., who heard the appeal to the High Court in this present suit, briefly dealt with the rights of an adopted son amongst Sudras as follows:—

"As to the share of the adopted son, it has been decided now that the fact of the adopted son being a Sudra does not give him an equal share with the natural-born sons. [*Karuturi Gopalan v. Karuturi Venkataraghavulu* (4)]. The dictum in *Raja v. Subbaraya* (1), which has been followed by the lower Court has been disapproved in that case. . . . The fourth defendant's share will therefore, be altered to one-thirteenth of one half of the family property."

(1) (1883) I. L. R. 7 Mad. 253.

(2) (1894) I. L. R. 18 Mad. 421 (422).

(3) (1894) I. L. R. 18 Mad. 434 (435).

(4) (1915) I. L. R. 40 Mad. 633 ; 29 M. L. J. 710.

P. C.  
1921.  
Perraru  
v.  
Subbarayadu.  
Sir John Edge.

P. C.

1921.

Perraru

Subbarayudu.

Sir John Edge.

From the decree of these learned Judges this appeal has been brought.

The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras until the law on that subject was disturbed in 1915 by the decision of the High Court at Madras in *Karuturi Gopalan v. Karuturi Venkataraghavulu* (1). It also appears to their Lordships that that rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara.

What has been said in the preceding paragraph is sufficient to dispose of the second of these consolidated appeals from the High Court at Madras, but as the Dattaka Chandrika is considered in Bengal as a high authority it will be satisfactory to consider what view has been expressed by the High Court at Calcutta about the rule of the Dattaka Chandrika as to the right of an adopted son in a Sudra family to share equally on a partition of the joint family property with a legitimate son of the adoptive father born subsequently to the adoption. The latest case of which their Lordships are aware in which the subject was discussed in the High Court at Calcutta was that of *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik* (2) which came on appeal before Chaudhuri and Newbould, JJ., from a decree of the 30th March, 1912, of Babu Kunja Behary Gupta, Additional Subordinate Judge of Birbhum, who, having found that the parties were Sudras, held that the adopted son was entitled to share equally with the after-born natural son. The learned Judges of the High Court say: "Clear authority for the proposition (the right of a Sudra's adopted son to share equally with the after-born legitimate son) is to be found in the Dattaka Chandrika (*see* V, sect. 29 to 32). The Dattaka Chandrika is a work of undoubted authority in Bengal. . . . In *Baramanund Mahanta v. Krishna Charan Patnaik* (3) a Bench of this Court accepted the law as laid down in the Dattaka Chandrika on this point. . . . There are no other decided cases exactly on the point (in the High Court at Calcutta). We feel bound to attach great

(1) (1915) I. L. R. 40 Mad. 632; 29 M. L. J. 719.

(2) (1916) 20 C. W. N. 901. (3) (1884) 14 C. L. J. 183.

weight to the fact that those decisions have remained unchallenged for over thirty years." The learned Judges then considered some texts of Manu, Yajñayalkya and the Mitakshara, and some other commentaries and concluded as follows: "Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis." The judgment is a long one as it also dealt with several other matters which do not affect the question here.

The result is that interest actually received on the sum of Rs. 7,000 must be allowed, and to this extent the decree must be varied, but subject thereto the first appeal must be dismissed. The slight alteration does not deprive the respondents, who appeared, their right to the costs.

The second appeal (No. 19 of 1919) must be allowed. The decree of the High Court must be set aside with costs so far as it varied the declaration in the decree of the Court of the Subordinate Judge as to the shares to which the parties are entitled, which last-mentioned decree must to that extent be affirmed and restored.

The appellants in the first appeal will pay the costs of the first three respondents who alone appeared, and the respondents in the second appeal will pay the appellants' cost of that appeal.

Their Lordships will humbly advise His Majesty accordingly.

*E. Dalgado* : Solicitor for Appellants.

*Douglas Grant* : Solicitor for Respondents.

A. P. P.

*Appeal of Perrazu dismissed: Decree varied.*

*Appeal of Ramanna allowed.*

P. C.

1921.

Perrazu

v.

Subbarayadu.

*Sir John Edgew.*

## APPELLATE CIVIL

Before Mr. Justice Mitra, and Mr. Justice Caspersen.

MADHU SUDAN SAHA CHAUDHURI AND OTHERS

CIVIL.

1908.

January, 14.

DEBENDRA NATH SARKAR\*

*Intermediate tenure—Zemindar's right to create—Tenure between putni and durputni—Suit for rent by intermediate tenure-holder against durputnidar.*

There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a putnidar and a dur-putnidar. It is immaterial what name is given to it.

A suit lies at the instance of a tenure-holder intermediate between a putnidar and a durputnidar, being an assignee of rent, to recover rent from the durputnidar.

Suit for rent.

Appeal by the Defendants.

The facts material for the purposes of this report are set out in the following extract from the judgment of the lower appellate Court.

"This appeal arises out of a suit for rent. The facts of the case are that the defendants Nos. 1 to 6 are tenant defendants who used to hold a darputni tenure under plaintiff's and co-defendants' putni tenure, that subsequently the plaintiff sold his putni right to Kisory Mohan Sanyal and Pyari Mohan who carried out an intermediate tenure naming it to be Kaemi Chirosthayi (perpetual) durputni under their putni right and granted it to the plaintiff, that subsequently the co-defendants being plaintiff's paternal uncles brought a pre-emption suit against the purchasers and lessors of the plaintiff, that that suit was compromised and the co-defendants got back the putni right from the purchasers keeping the arrangement between them and plaintiff in tact, and that as such kaemi perpetual durputnidar, the plaintiff has brought this suit for recovery of rent in respect of the principal defendant's durputni making the putnidars the co-defendants in the suit. The principal

\* Appeal from Appellate Order No. 90 of 1907 against the order of Babu Chandra Nath Ghosh, Subordinate Judge of Pabna and Bogra, dated the 12th December, 1906, reversing the decree of Babu Jnanendra Mohan Das, Munsiff of Bogra, 2nd Court, dated the 26th April, 1906, and remanding the case to his Court for fresh trial.

defendants amongst other things pleaded that the plaintiff as durputnidar cannot recover rent from them who are also durputnidars."

The Court of first instance upheld this contention and dismissed the suit. The Subordinate Judge held that it was competent to the superior landlords to create an intermediate tenure on the strength of which the holder of it will be able to realise rent from the under-tenure-holders. He accordingly allowed the appeal and remanded the case to the primary Court for investigation of other questions which arose upon the pleadings. The tenants defendants thereupon preferred the present appeal.

*Babu Priyasankar Majumdar* for Appellant.

*Babu Debendra Nath Bagchi* for Respondent.

The judgment of the Court was delivered by

**Casperz J.**—There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a putnidar and a dur-putnidar. It is immaterial what name is given to it. The plaintiff sued in the character of an intermediate tenure-holder and he was merely an assignee of the rent. We do not see why a suit should not lie at his instance to recover rent from the dur-putnidar. We accordingly dismiss this appeal with costs, one gold mohor.

A. T. M.

*Appeal dismissed.*

*Before Mr. Justice Carnduff and Mr. Justice Richardson.*

NILAMBAR GHOSH AND ANOTHER.

MIR MOHASANUDDIN\*

*Intermediate tenure—Zemindar's right to create—Tenure between zemindari and putni—Suit for rents by Mirashdar against putnidar.*

\*Appeal from Appellate Decree No. 2604 of 1913, against the Decree of Babu Sarat Chandra Sen, Subordinate Judge of Dacca, dated the 23rd April, 1913, affirming that of Babu Bamandas Mookerjee, Munsiff of Dacca, dated the 9th December, 1912.

CIVIL:

1908:

Madhu Sudan

Debendra.

January, 14.

CIVIL:

1914:

January, 2.

CIVIL.  
1914.  
Nilambar  
v.  
Mohasannuddin.

A zemindar can create a tenure between the zemindari and the putni which had already been created under it: *Raj Kumar v. Probal* (1) followed. Dictum in *Bibi Jarao v. Hanifuddin* (2) not followed.

A mirashdar, between a zemindar and a putnidar can recover rent from the putnidar.

Appeal by the Defendants.

Suit for rent.

The facts material for the purposes of this report may be stated briefly. The plaintiff claimed rent and cesses from the defendants on the allegation that they held a putni taluk of the lands in suit, which had been created in their favour by the zemindar in 1278. In 1279, the Zemindar granted a *mirash* settlement in respect of the entire village to the predecessors of the plaintiff and the *proforma* defendants. The putnidars-defendants resisted the claim on the ground that according to law zemindar had no authority to create the *mirash* tenure between himself and the putnidars and thereby to entitle the *mirashdar* to recover rent from the putnidars. The Courts below overruled this contention and decreed the suit. The present appeal was then preferred on the ground that the zemindar cannot according to law create a tenure between the zemindary and the putni which had already been created under it.

The appeal was heard under Order XLI Rule 11 C. P. C.

*Babus Surendra Chandra Sen* and *Trailokyanath Ghosh* for the Appellants.

The following judgment was delivered:

January, 2.

Following the decision of this Court in *Raj Kumar Mazumdar v. Probal Chandra Ganguli* (1) by which we are bound, rather than the *obiter dictum* pronounced in *Bibi Jarao Kumari Saheba v. Hanifuddin Akand* (2) we dismiss this appeal under order XLI rule 11 C. P. C.

A. T. M.

*Appeal dismissed.*

(1) (1904) 9 C. W. N. 656. (2) (1909) 14 C. W. N. 389.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice  
Buckland.

JOHAR MULL BHUTRA AND OTHERS

v.

JATINDRA NATH BOSE AND OTHERS\*

Civil.

1921.

June, 7, 28.

*Intermedigle tenure—Zemindar's right to create—Concurrent lease—Lispendens—Suit for specific performance of contract—Intermediate conveyance.*

If, after a lease has been granted, another lease of the same premises is granted, the term being concurrent with that of the existing lease, the concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue and afterwards to possession for the remainder, if any, of his own term; if the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term: *Neale v. Mackenzie* (1).

A zemindar or tenure-holder who has carved out a tenure or under-tenure as the case may be, is competent to interpose, between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant; but he cannot prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred or limit its extent or restrain its operation: *Raj Kumar v. Probal* (2) approved. Dictum in *Bibi Farao v. Hanifuddin* (3) explained.

When a suit for specific performance of a contract for transfer of immovable property is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based, and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. Such a suit operates as *Lis pendens*: *Mati v. Freo* (3) referred to.

Appeal by the Plaintiff.

Suit for recovery of arrears of rent of a tract of homestead land.

The material facts appear from the judgment of Mookerjee J.

*Babus Bepin Bihari Ghose, Bhupendra Kumar Ghose, Pramatha Nath Banerjee and Rama Prosad Mookerjee* for the Appellants.

\* Appeal from Appellate Decree No. 2682 of 1917, against the decree of Babu Asutosh Ghose, Subordinate Judge of Hooghly, dated the 30th May, 1917, reversing that of Babu Chandra Sekhar Sen, Munsiff of Howrah, dated the 9th July, 1915.

(1) (1836) 1 M. and W. 747; 46 R. R. 478.

(2) (1904) 9 C. W. N. 656.

(3) (1909) 14 C. W. N. 389.

(4) (1908) 9 C. J. J. 96; 13 C. W. N. 226.

CIVIL.

1921.

Jobar Mull

Jatindra.

June, 28.

*Babus Dwarka Nath Chuckerbutty and Kanai Dhone Dutt* for  
the Respondents.

C. A. V.

The judgments of the Court were as follows :

**Mookerjee J.** This is an appeal by the plaintiffs in a suit for recovery of arrears of rent of a tract of homestead land. The rent is claimed at the rate of Rs. 7-6as-12½ gds per annum for the years 1318 to 1320 B. S. and for the first nine months of the year 1321. It is not disputed that Srinarayan Santra, Jagannath Santra, Rajnarayan Santra and Debnarayan Santra were owners of the disputed land in equal shares. There is also no controversy that the contesting defendants held the land as tenants under the Santras at the rate of rent mentioned in the plaint. The plaintiffs claim to have derived title from the Santras, as to one half of the property, under a conveyance dated the 3rd August, 1911, and as to the other half, under a permanent lease dated the 15th February, 1907. The defendants resisted the claim on a three-fold ground; namely, first, that the alleged title of the plaintiffs as purchasers was inoperative, because the interest of their vendors had passed away to strangers before the date of their conveyance; secondly, that the alleged title of the plaintiffs as tenure-holders was inoperative, because the defendants had obtained a conveyance of the identical share from the Santras before the lease to the plaintiffs; and, thirdly, that if the title of the plaintiffs was found to have been subsisting at the date of the suit and the title of the defendants was negatived, the plaintiffs were still not entitled to realise rent from the defendants, as both of them held as tenants of co-ordinate rank under the Santras. The trial Court found partially in favour of the plaintiffs and decreed the suit to that extent. On appeal, the Subordinate Judge has reversed this decision. On the present appeal, the following points have emerged for consideration from the arguments addressed to us; first, did the plaintiffs acquire the title of the Santras, as to one half of the land, under their conveyance dated the 3rd August, 1911; secondly, did the plaintiffs acquire, under their permanent lease from the Santras dated the 15th February, 1907, such an interest in the other half of the land as must have priority over the interest acquired by the defendants, under their conveyance from the Santras dated the 25th April, 1910; thirdly, does the relationship of landlord and tenants exist between the parties, in view of the nature of the leasehold interest created by the Santras in favour of the plaintiffs under the lease dated the 15th February, 1907, and the character of the tenancy of the defendants which is



CIVIL.

1921.

Johar Mull

v.

Jatindra.

Mookerjee, J.

alleged to have been held under the Santras at a uniform rate of rent since at least 1854.

As regards the first question, there is no room for controversy that the plaintiffs did not acquire the title of the Santras in one-half of the land under their purchase dated the 3rd August, 1911. It appears that the interest of their vendors had been sold away in execution proceedings on the 17th June, 1898 and the 17th March 1899. At the time of the sale by the Santras to the plaintiffs on the 3rd August, 1911, they had no title to convey. Consequently, on the most favourable view of the case, the claim of the plaintiffs for recovery of arrears of rent cannot possibly be sustained in excess of a half share.

As regards the second question, it is plain that the defendants did not, under their conveyance from the Santras dated the 2nd February, 1910, acquire a title which could prevail over that of the plaintiffs. It appears that on the 15th February, 1907, two of the Santras granted a mourasi mokrari lease to the plaintiffs in respect of all their properties in the village of Santragachi, for a premium of Rs. 17,800 at an annual rent of Rs. 1200. Eighty five parcels were specified in the schedule and it was expressly stated that if thereafter any other parcel of land was discovered to have been omitted by mistake, a supplementary deed would be executed in respect thereof. The contingency contemplated happened. It was discovered that the tenancy now in dispute had been left out by mistake from the list of mourasi mokrari tenancies in the schedule to the lease. The Santras, however, failed to execute the requisite supplementary deed in the terms of their agreement. The result was that on the 8th July, 1909, the plaintiffs sued the Santras to enforce specific performance of the agreement. That suit was decreed on the 25th April, 1910. It was during the pendency of this litigation that the Santras sold away their interest on the 2nd February, 1910, to the present defendants. It is manifest that the defendants were purchasers *pendente lite* and the interest they purchased was bound by the decree in the suit for specific performance. It was ruled by this Court in the case of *Mati Lal Pal v. Prem Nath Mitra* (1) that a suit for specific performance of a contract for transfer of immovable property operates as *lis pendens*; in other words, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the Court. The obvious reason for this is that if when the

(1) (1908) 9 C. L. J. 96; 13 C. W. N. 226.

CIVIL

1921.

Johar Mull

v.

Jatindra.

Mookerjee, J.

jurisdiction of the Court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to litigation and justice would be defeated. Consequently, when such a suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based, and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. The same view was adopted in the case of *Promotha Nath v. Jagannath Kisor* (1). There is consequently no escape from the position that the title of the plaintiffs which was established by the decree made in their favour in the suit for specific performance relates back to the 15th February, 1907; the date of the mourasi mokrari lease granted to them by the Santras. The inference follows that the conveyance taken by the defendants from the Santras on the 2nd February, 1910, does not afford them effective protection against the claim of the plaintiffs based on their lease-hold title dated the 15th February, 1907.

As regards the third question, it is clear that the position which results from our determination of the previous points lies in a nutshell. The defendants have been tenants under the Santras for a long series of years; they assert, indeed, that the holding is mourasi mokrari, that is, held from generation to generation at a fixed rent. While the defendants were thus in occupation as tenants, their landlords, the Santras, granted to the plaintiffs on the 15th February, 1907, a mourasi mokrari lease of a large tract of land inclusive of the disputed area. The plaintiffs claim to recover from the defendants the rent which would have been otherwise payable to the Santras. The defendants answer that the tenancy of the plaintiffs is co-ordinate in rank with their own tenancy, and the plaintiffs cannot consequently be deemed to be their landlords. Here we may state parenthetically that the plaintiffs do not admit that the tenancy of the defendants is mourasi mokrari; but we shall assume for our present purpose that the defendants have in fact the status alleged by them. We are of opinion that even on this assumption, the defendants have no answer to the claim of the plaintiffs, because a zemindar or tenure-holder who has carved out a tenure or under-tenure, as the case may be, is competent to interpose, between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant. This proposition is recognised in a series of cases in this Court. In *Raj Kumar v. Probal Chandra* (2), it was ruled that a zemindar, who

(1) (1912) 17 C. L. J. 427.

(2) (1904) 9 C. W. N. 656.

had created a patni, had power to grant away a portion of his remaining rights and to create a tenure intermediate between himself and the patnidar, with the result that the intermediate holder would become entitled to demand the rent which the patnidar would have been otherwise bound to pay to the superior landlord. The Court pointed out, however, that the interposition of such an intermediate interest could not operate in derogation of the rights of the original patnidar or degrade him to the rank of a darpatnidar. The essence of the matter was that while the relationship of landlord and tenant originally existed between the zemindar and the patnidar, after the interposition of the intermediate tenure, the new tenure-holder became tenant under the zemindar at the same time that he himself became the landlord of the patnidar. This decision is not opposed to the case of *Kalam Sheikh v. Panchu Mandal* (1). There the defendant was under-tenant in respect of lands which his lessor held under a *mudafut* from the zemindar. Subsequently, the lessor left, and the zemindar gave to the defendant a *patta* for part of the lands covered by the *mudafut*, and, later on, to the plaintiff a *patta* for the whole land covered by the original *mudafut*. The plaintiff instituted a suit against the defendant for a *kabuliyat* at an enhanced rate. The defendant answered that there was no relationship of landlord and tenant between himself and the plaintiff. Mr. Justice Dwarkanath Mitter upheld this contention, not on the ground that the zemindar could not interpose the plaintiff as lessee between himself and the defendant, but on the ground that upon a true construction of the lease granted to the plaintiff, it could not be maintained that the zemindar had assigned to him any of his rights to recover or enhance the rent reserved in the *patta* he had granted to the defendant. We are not unmindful that an apparently contrary view was indicated in the case of *Bibi Jarao Kumari v. Hanifuddin* (2), where the earlier decision in *Raj Kumar v. Probal* (3) was not brought to the notice of the Court. But the *dictum* in that case does not controvert the proposition that when a zemindar or tenure-holder has created a tenure or under-tenure, he is still competent to interpose between himself and his grantee an intermediate tenure or under-tenure. The *dictum* rather casts doubt upon the applicability of this general rule to the case of patni taluks whose incidents are governed by the special rules formulated in Reg. VIII of 1819; it is also plain that the doubt was expressed, because no authority had been cited to support the view that a zemindar could

CIVIL.

1921.

Johar Mull

v.

Jatindra

A. ocherjee, J.

(1) (1869) 2 B. L. R. 252; 11 W. R. 128.

(2) (1903) 14 C. W. N. 389.

(3) (1904) 9 C. W. N. 630.

## CIVIL.

1901.

Johar Mull

v.

Jatindra.

Mookerjee, J.

lawfully create a permanent tenure between his own interest and a patri taluk of the first degree. In the case before us, the status of the defendant is not that of a patnidar, and, consequently we are not pressed by the considerations which carried weight with the Court in the case of *Bibi Jarao Kumari v. Hanifuddin* (1). Apart from this, we find that the decision in *Raj Kumar v. Probal* (2) was accepted as good law by Mr. Justice Sarada Charan Mitra in *Madhu Sudan v. Debendra Nath* (3) and *Ram Kanai v. Fakir Chand* (4); and in the case of *Nilambar Ghosh v. Mir Mahasanuddin* (5) when Carn-duff and Richardson, JJ., were pressed by the apparent conflict between the decisions in *Raj Kumar v. Probal* (2) and *Bibi Jarao Kumari v. Hanifuddin* (1), they followed the earlier decision as binding on them. The view we take is also supported by the decision in *Ram Anant v. Shankar Singh* (6). In that case, Sir John Stanley, C.J. held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor, after the execution of the second lease, can recover rent only from the second and not from the first lessee. The Chief Justice referred to the decision of Baron Parke in *Harmer v. Bean* (7), which shows that the operation of a concurrent lease of the kind is to transfer part of the reversion of the landlord to the lessee, so that after the execution of such concurrent lease, the landlord cannot recover as against the first lessee any rent due thereafter. To the same effect is the decision in *Burrows v. Gradin* (8) where Wightman, J. ruled that a mortgagee may maintain an action for use and occupation against a party who was tenant to the mortgagor before the mortgage, although subsequently to the mortgage, the mortgagor had made an alteration in the premises mortgaged and in the amount of rent. The same principle was recognised by Lord Alverstone, C.J. in *Wordsley Brewery Co. v. Halford* (9), when he ruled that a landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant notice to quit; in support of this principle, reliance

(1) (1909) 14 C. W. N. 389. (2) (1904) 9 C. W. N. 656.

(3) (1908) 7 C. L. J. 23 S. N. ; 34 C. L. J. 76. (4) (1904) 8 C. W. N. 438.

(5) (1914) 34 C. L. J. 77. (6) (1908) 1 L. R. 30 All. 369.

(7) (1853) 3 C. and K. 307.

(8) (1843) 1 D. and L. 213 ; 12 L. J. Q. B. 333.

(9) (1903) 90 L. T. 89.

was placed upon *Dood. Agar v. Brown* (1) in which Lord Campbell, C.J. had held that where a party entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested estate carved out of the remainder, so that the conveyance is as effectual as if attornment had been made by the tenant of the particular estate. This was overlooked by Page Wood, V. C. in *Edwards v. Wickwar* (2) but was reaffirmed by Ridley and Lush JJ. in *Horn v. Beard* (3). Indeed, it is now settled law that if, after a lease has been granted, another lease of the same premises is granted, the term being concurrent with that of the existing lease, the concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue and afterwards to possession for the remainder, if any, of his own term; if the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term; *Neale v. Mackenzie* (4). The principles thus expounded and applied justify the inference that a landlord who has created a tenancy is still competent to carve out another tenancy from the interest he has reserved and interpose the same between himself and his first tenant, subject to the qualification that he cannot thereby prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred, or, limit its extent or restrain its operation; for the maxim applies that no man can derogate from his own grant, which has sometimes been regarded as in essence a formulation of a principle of estoppel. This may be illustrated by a concrete example. A. a zamindar, settles a tract of vacant land with B, an agriculturist, with a view to enable him to bring it under cultivation. A cannot thereafter settle the same parcel with C. so as to entitle C. to enter into actual occupation and cultivate the land. But there is no reason why A. should not grant a settlement to C, and thereby enable C. to realise from B the rent which would otherwise be payable by B to A. Tested from this point of view, how do the parties to this litigation stand? The defendants were originally tenants directly under the Santras; assume for the purpose of argument, and for that purpose alone, that their tenancy was held at a fixed rate of rent from generation to genera-

CIVIL.

1921.

Johar Mull

v.

Jatindra.

Mookerjee, &amp;c.

(1) (1853) 2 El. and Bl. 331; 95 R. R. 580.

(2) (1866) L. R. 1 Eq. 403; 35 L. J. Ch. 309.

(3) (1912) 8 K. B. 181. (4) (1836) 1 M. and W. 747; 46 R. R. 478.

CIVIL.

1921.

Johar Mull

Jatindra.

Mookerjee, J.

tion. On the 15th February, 1907, the Santras granted to the plaintiffs a permanent lease of all their lands in the village, including the lands covered by the tenancy of the defendants; this authorised the plaintiffs to realise rent from all tenants who might be in occupation including maurasi-mokrari tenants. It is difficult to appreciate on what principle the view can possibly be maintained that the plaintiffs are not competent to realise, as they seek to do by this suit, the rent which would have been otherwise payable to the Santras. It is plainly immaterial that the defendants assert that they themselves, as also the plaintiffs, have maurasi mokrari rights. When the Santras granted a lease to the plaintiffs, they did not derogate from their previous grant, and the plaintiffs do not allege that the lease in their own favour has in any manner operated to the detriment of such rights as might have been actually possessed at the time by the defendants. It is consequently needless to investigate whether the defendants hold a moursi mokrari tenancy, for even on the assumption that their allegation is well-founded, it does not afford an answer to the claim of the plaintiffs.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. The appellants are entitled to all costs in this Court as also in the Court of the Subordinate Judge inclusive of the costs of the review proceedings.

Buckland J.—I agree.

A. T. M.

*Appeal allowed.*

## PRIVY COUNCIL.

PRESENT: *Lord Buckmaster, Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.*

RAJA PEARY MOHAN MUKERJI

v.

MONOHAR MUKERJI & OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

*Shedding office of—Grounds for removal—Incapacity of trustee to purchase trust-estate, not confined to case of trustee for sale—Basis of the rule—Secret purchases by trustee, never permissible.*

P. C.

1921.

February, 14, 15.  
April, 19.

The grounds for removing a shebait from office may not be identical with those upon which a trustee would be removed in England, but if a shebait in the exercise of his duties has put himself in a position which precludes him from faithfully discharging the obligations of his office, that is sufficient ground for his removal.

A trustee, if not a trustee for sale, can acquire an estate from beneficiaries who are *exi juris*, but only if he has made the fullest disclosure to them of all facts within his knowledge as to the value and condition of the estate and the parties are at arm's length: otherwise the purchase is bad. The basis of the rule is that a person occupying a fiduciary relation may not use for his own benefit information which he has acquired as to the trust estate: *Nugent v. Nugent* (1) approved.

Even if a person in a fiduciary position is otherwise entitled to purchase, yet if he effects the purchase secretly in another person's name, such purchase can never be allowed to stand.

*Monohar v. Peary* (2) approved.

Consolidated appeals from a decree of the Calcutta High Court (Mookerjee and Panton JJ.) dated July 24, 1919, reversing a decree of the Second Subordinate Judge of Hooghly, dated the 23rd December, 1915.

The facts of the case are sufficiently stated in their Lordships' judgment and in the judgment of the High Court reported in 30 C. L. J. 177.

*Sir John Simon K. C.* (with him *De Gruyther K. C.* and *Parikh*) for Appellants: There are two questions here: whether lot Bahirgora is part of the trust estate, and whether the Raja should be removed from his office of shebait. Some previous litigation is reported: *Peary Mohan v. Narendra* (3) In that litigation a judgment was given against the trust estate. This village, lot Bahirgora, was put up for sale. The Raja did his best to stop the sale, and finally bought the property at an exorbitant price. It is a matter of indifference to us whether the purchase stands, except that it is made a principal ground for removing us from office. I submit the purchase was good. The sale was not *ipso facto* void, but at most voidable.

[*Lord Buckmaster*: If the beneficiary applies to set aside the sale, the burden is on the trustee to show why it should not be set aside.]

The sale was not a sale by the Raja. The relation of trustee had

(1) (1908) 1 Ch. 546. (2) (1919) 30 C. L. J. 177.

(3) (1909) L. R. 37 I. A. 27; I. L. R. 37 Calc. 229; 11 C. L. J. 220.

P. C.

1931.

Raja Peary Mohan

Monohar.

P. C.

1921.

Raja Peary Mohan

v.  
Monohar.

ceased : the Raja had broken off all connection which put a duty upon him. The estate was taken out of his hands and the property attached and sold at the instance of the judgment creditor. Reference was made to Lord Cairns's judgment in *Thomson v. Eastwood* (1) and to *Dougan v. Macpherson* (2) as to the duties and obligations of trustees dealing with their *cestuis que trusts* and to the Code of Civil Procedure, Act V of 1908, order 21, rule 64 &c. as to the conduct of execution sales in India. In India the sale is in the hands of the Court : the trustee here neither sold nor procured the sale.

[*Lord Shaw* referred to rule 73. They are trying to exclude every one who has any interest in keeping the price down.]

[*Lord Buckmaster* : Is it not the duty of the trustee to give all the information in his power ?]

In India the Court ascertains all material particulars and states them in the proclamation of sale : order 21 rule 66. The Subordinate Judge aptly points out that when the law excludes a judgment-debtor from bidding, it does so in express terms, as in the Bengal Tenancy Act and that the Code of Civil Procedure does not exclude him.

It was laid down by Field J. in *Plowright v. Lambert* (3) that a trustee for sale cannot sell to himself, and that even if he be not a trustee for sale, the burden of proof lies on him to show that every possible advantage has been gained for the trust. I accept that burden. The matters to be stated in the sale proclamation are all to be found in the public records. The sale here is not only not by the trustees, but it is by a person who is adverse to the trustee.

[*Lord Buckmaster* : The difficulty is that the trustee has had the advantage of acquiring special information—it is like the case of a solicitor—the mere possession of knowledge may disqualify. *Nugent v. Nugent* (4), where it was held that a receiver appointed by the Court could not purchase the property.]

That may be distinguished as being the case of a receiver and anyhow is not binding on this Board.

[*Dunn*, K. C., for Respondents : *Nugent v. Nugent* (4) went to the Court of Appeal (5)] :

It has been argued that the leave of the Court must be obtained, and that anyhow the purchase must not be made in another name :

(1) (1877) 2 A. C. 236.

(2) (1902) A. C. 197 (204).

(3) (1885) 52 L. T. 646 (652, 653).

(4) (1907) 2 Ch. 292.

(5) (1908) 1 Ch. 546.



and reliance has been placed by the High Court on *Lewis v. Hillman* (1) and *Macpherson v. Watt* (2) : but these cases both proceed on the assumption that the trustee has something to do with the sale. Under the scheme in India for such sales the shebait's connection or duty with the property has ceased. It has been held in the United States that a trustee may purchase trust property at a judicial sale which has been brought about by a third party, which he has taken no part in procuring and could not have controlled : *Allen v. Gillette* (3). That is practically this case. As to the shebait's obtaining the leave of the Court, there is no provision for it in the Code of Civil Procedure. In the Bengal Tenancy Act there is an express provision.

[*Lord Buckmaster* : The Court exercises that jurisdiction here without any rule.]

If this first point is decided against us, I contend that I should be repaid from the trust estate the amount which I paid through my son.

As to the removal of the Shebait, there are six items of misconduct mentioned in the plaint and we have complete answers to all of them. The High Court have been very much prejudiced against us by the view they have adopted as to the purchase. There is no good ground for removal made out.

[*Lord Dunedin* : The harder the case is against you on the first point, the less it should affect the decision on the second.]

[*Mr. Amir Ali* : The burden of the charge against you is what your acts have led to.]

*Dunne K. C.* (*Kenworthy Brown* with him) for Respondents :

The *cestui que trust* here is an idol and can have no knowledge except through the shebait : the idol cannot be put on enquiry, for you cannot give it knowledge. The principle of *Nugent v. Nugent* (4) applies. If the shebait has bought at all and could possibly be in a position where his interest and duty conflicted it ends the matter. Here also appellant did not state the truth as to the purchase, and in fact committed perjury. In *Macpherson v. Watt* (2) such suppression of the purchase was held sufficient to upset it. If an agent can show he is entitled to purchase property, notwithstanding his character of agent, yet if instead of purchasing openly, he purchases in the name of a third person without disclosing the fact, such purchase is void : *Lewis v. Hillman* (1). Appellant here swore throughout he did not buy the property.

(1) (1852) 3 H. L. C. 607.

(3) (1887) 127 U. S. 589.

(2) (1877) 3 A. C. 254.

(4) (1907) 2 Ch. 292.

P. C.

1921.

Raja Peary Mohan  
v.  
Monohar.

P. C.

1911.

Raja Peary Mohan  
v.  
Monohar.

April, 19.

On the other part of the case the purchase was only one of several circumstances justifying the Raja's removal. He was quite reckless in his litigation as to what cost he put upon the estate.

*De Gruyther, K. C.* replied, more especially as to the form of order.

Their Lordships' judgment was delivered by

**Lord Buckmaster.**—Many questions were originally involved in the dispute which has given rise to this appeal, but of these two only remain. The first relates to the continuance of the appellant Raja Peary Mohan Mukerji in the office of shebait to the debottar estate of Sri Sri Iswar Gopaleswar Shiva Thakur and Sri Sri Iswar Shridhar Thakur, and the second to the purchase in January, 1913, of a certain lot known as lot Bahirgora, which was sold in execution under circumstances to which their Lordships will briefly refer.

By his will, dated the 11th September, 1840, Jaga Mohan Mukerji dedicated certain properties to the worship of the two Thakurs established by him, for the annual celebration of the Durga Pūja, the Sradh of ancestors, and other pious usages, the will providing for the order of succession to the office of the Shebait among the testator's own descendants. The testator died shortly after the execution of his Will, and in September of 1890 the succession to the shebaitship opened, owing to the death of the then shebait. Disputes arose as to who was the true successor, which resulted in a decree of the 29th January, 1894, that one Bijoy Krishna was the rightful shebait, but on the day of the decree he died. Further litigation then ensued between the sons of Bijoy Krishna and the Raja who is the appellant in the first of these appeals, which ultimately resulted in a decree of the 30th June, 1903, made by the Subordinate Judge in favour of the sons of Bijoy Krishna for Rs. 45,960, which sum it was ordered should be recovered by the plaintiffs out of the debottar estate in the hands of the Raja as its shebait. Appeals were taken from this judgment to the High Court, and again from the High Court to his Majesty in Council, but these appeals failed. Execution proceedings were then instituted in order to secure a sale out of the debottar estate of the lot that is now in dispute, and on the 14th January, 1913, the said lot was sold at a public Court sale for Rs. 1,56,600 to the appellant in the second appeal, who is the son of the Raja.

On the 17th February, 1913, proceedings were taken by Monohar Mukerji, who is the first respondent to these appeals, asking among

other things for the removal of the Raja from the office of shebait and for an order to set aside the purchase of the estate. The Subordinate Judge dismissed the suit, but he held, contrary to the contention of the Raja's son, that the purchase was benami and made with the Raja's money for his benefit. An appeal was taken from the decree following this judgment to the High Court of Calcutta, and was allowed. The High Court supported the view that the sale was in fact benami for the Raja who held a fiduciary position in relation to the estate, and they held that in these circumstances the purchase could not be supported. They also decided that the Raja should cease to be shebait and that the management of the estate should be vested in a receiver to be appointed by the Court. A decree was accordingly drawn up carrying out these views, and from this decree both the Raja and his son have brought the present appeals, which have been consolidated by an order in Council.

Upon the question of the removal of the Raja, the learned Subordinate Judge thought that there was no sufficient charge of misconduct to justify his removal; but the High Court took a different view, and thought that the protracted litigations by which the estate had become heavily burdened with debts, and the circumstances associated with the claims which he was seeking to establish against the estate for litigation expenses, were such as to render it undesirable that he should continue in the office. They also found that the purchase could not be sustained. Their Lordships are not prepared to interfere with these conclusions. The grounds for removing a shebait from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of shebait may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal. It is this that forms the foundation of the judgment of the High Court, and the appellant has not satisfied their Lordships that the facts were misinterpreted or the reasoning unsound.

Upon the remaining question also their Lordships think that the High Court was right. The argument in favour of the appellant here also turns upon the dissimilarity between the office of shebait

P. C.

1921

Raja Peary Motan

v.

Monohar.

Lord Buckmaster.

P. C.

1921.

Raja Peary Mohan

v.  
Monohar.

Lord Buckmaster.

and the ordinary office of a trustee. A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee of the estate, although his incapacity to buy is not absolute and is subject to different limitations it is equally well established. A trustee may indeed acquire from beneficiaries who are *sui juris* an estate in which they are interested, but he can only do this if he has made the fullest disclosure to them of all the relevant and material facts within his knowledge affecting or that might affect the value and condition of the estate and the parties are at arm's length, the *cestui que trust* knowing that he is dealing with the trustee. Otherwise the purchase is bad, and it is bad because any person who occupies a fiduciary relationship may be able by virtue of his position to acquire information with regard to the trust estate which he is not permitted to use for his own benefit. Their Lordships recognize the force of the argument that points out the dissimilarity between a shebait and trustees to whom this rule applies. There is no doubt that the word "trustee" covers a very large number of relationships involving different obligations; the word "trust," therefore, may be so used that it is intended to apply only to one class of such duties; and it follows that rules and decisions which depend upon the special conditions attached to the particular class would not of necessity apply to another where these conditions did not exist. The rule forbidding the purchase of an estate by a person who stands in regard to his dealings with it in a fiduciary relationship is, however, general in its application. In the case of *Nugent v. Nugent* (1), it was held that a receiver appointed by the Court cannot purchase the property of which he is receiver without the leave of the Court, even where the sale is not made in the action in which he was appointed, but by a mortgagee selling with leave outside the suit. Their Lordships think that this was a correct decision and shows the wide area of dispute which is covered by the rule.

Further, in the present case it is now established by two concurrent findings of fact that the Raja purchased the property benami in the name of his son, and by this means concealed the fact that he was the real purchaser; their Lordships bear in mind that such classes of purchase are very common in India and are due to many considerations which may not find their counterpart here, yet none the less they can easily be made a cloak and cover

(1) (1907) 2 Ch. 292.

for improper and even dishonest transactions, and they think the rule laid down by Lord St. Leonards in *Lewis v. Hillman* (1), that even if an attorney or agent can show that he is entitled to purchase, yet if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment, should apply to this case.

Their Lordships have not overlooked the fact that in the present instance the purchase was for an abundant price, one that is said to be largely above its market value, but such considerations cannot have weight where the purchase is challenged upon the grounds in the present suit.

It is unnecessary to examine further in detail the law upon this matter, for it is fully, and in their Lordships' opinion accurately, analysed in the judgment of the High Court, where the relevant authorities are quoted and properly applied. They think, therefore, that this appeal must fail and that an order must be made declaring that the purchase by the second appellant was invalid and that proper and necessary steps should be taken to secure the property; and that the first appellant is entitled, subject as herein mentioned, to repayment of the purchase money. An account should be directed showing what, if anything, is due from the first appellant to the estate, and such money should be deducted from the purchase moneys, the balance, if any, of the moneys in Court to be paid out and the first appellant to have a charge on the estate for such sum. The appellants will pay the costs of the appeals.

They will humbly advise His Majesty to this effect.

*E. Dalgado* :—Solicitor for Appellants.

*Vallance and Vallance* : Solicitors for Respondent.

A. P. P.

*Appeal dismissed.*

(1) (1852) 3 H. L. 607.

P. C.

1921.

Raja Peary Mohan

v.

Monohar.

Lord Buckmaster.

## REFERENCE UNDER COURT-FEES ACT.

*Before Sir Asutosh Mookerjee, Knight, Judge.*

SAILENDRA NATH MITRA

v.

RAM CHARAN PAL AND OTHERS.\*

CIVIL.

1921.

April, 8.  
May, 16.*Jurisdiction—Court-fees—Court-Fees Act (VIII of 1870), section 7 (X) (c)—Suits Valuation Act (VII of 1887), section 8.*

A suit for specific performance of a contract of lease, should be valued first for payment of court-fees in accordance with the rule embodied in section 7, sub-section (X) clause (c) of the Court-Fees Act. Then the value so determined should be adopted for purposes of jurisdiction.

The valuation for assessment of Court-fees controls the valuation for purposes of jurisdiction.

Reference under section 5 of the Court-Fees Act.

The material facts appear from the judgment.

*Babu Baranasibasi Mookerjee* for the Appellant.

*Babu Ram Charan Mitra* for the Government.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee J.**—This is a Reference under section 5 of the Court-Fees Act, in an appeal from appellate decree which arises out of a suit for specific performance of a contract to grant a lease. The suit which was instituted on the 27th August, 1915, in the Court of the Subordinate Judge of Midnapur, was valued at Rs. 1,200 for the purpose of determining the jurisdiction and at Rs. 32 for the purpose of payment of court fee. The claim was decreed in the Court of first instance and the first defendant was directed to execute in favour of the plaintiffs a lease for the disputed land on a fixed rental of Rs. 32. On appeal to the District Judge, the decision of the primary Court was reversed on the 17th January, 1918 and the suit was dismissed. On second appeal to this Court, the decree of the District Judge was set aside and the case was remanded for retrial. After remand, the District Judge reheard the appeal and affirmed the decree of the Court of first instance. Against this decree a second appeal has been preferred to this Court. The appeal has been valued at Rs. 32 which

\* Reference under Court Fees Act in Appeal from Appellate Decree No. 174 of 1921, against the decree of Mr. K. K. Sen, District Judge of Midnapur, dated the 4th October, 1920, affirming that of Babu Shama Charan Chakrabarti, Subordinate Judge of Midnapur, dated the 23rd September, 1916.

May, 16.

CIVIL.

1921.

Sailendra

Ram Charan.

is the amount of rent annually payable for the contract of tenancy sought to be specifically enforced. This valuation was based on section 7, sub-section (X) clause (c) of the Court-fees Act. Objection was taken by the Stamp Reporter to the valuation on the ground that under section 8 of the Suits Valuation Act the court-fee was payable on the value of the appeal as stated for purposes of jurisdiction. As this view was controverted on behalf of the appellant, the matter was placed before the Taxing Officer, who referred the question to the Chief Justice, as it was in his opinion one of general importance. The determination of the point in controversy depends upon the true construction of section 7, sub-section (X) clause (c) of the Court-Fees Act and section 8 of the Suits Valuation Act.

Section 7, sub section (X) clause (c) of the Court-Fees Act provides that the amount of fee payable in a suit for specific performance of a contract of lease shall be computed according to the aggregate amount of the fine or premium, if any, and of the rent agreed to be paid during the first year of the term. Section 8 of the Suits Valuation Act provides that where in suits other than those referred to in the Court-Fees Act, 1870, section 7, paragraphs V, VI, IX and paragraph X, clause (d) court-fees are payable *ad valorem* under the Court-Fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. The view taken by the Stamp Reporter is that as the suit has been valued for purposes of jurisdiction at Rs. 1200, the value as determinable for the computation of court-fees must also be deemed to be Rs. 1200. I am of opinion that this position cannot be supported, as it ignores the provision in section 7 of the Court-Fees Act which is brought into conflict with the provision in section 8 of the Suits Valuation Act. If the construction put upon section 8 of the Suits Valuation Act, namely, that the valuation for purposes of jurisdiction is to be determined by the market value of the property and that valuation is to be taken for the purposes of payment of Court-fees, were correct, the effect would be to nullify the provisions of section 7 of the Court-fees Act. The right construction of section 8 of the Suits Valuation Act is that the valuation for the purposes of jurisdiction should, in the cases mentioned there, follow and be the same as the valuation for court-fees. This view is supported by the decision in *Hari Sanher v. Kali Kumar* (1), which approved the earlier cases of *Bai Varunda v. Bai Manegavri* (2); and *Velu v. Kumaravelu* (3).

(1) (1905) I. L. R. 32 Calc. 734.

(2) (1893) I. L. R. 18 Bom. 207.

(3) (1896) I. L. R. 20 Mad. 289.

CIVIL.

1921.

Sailendra

v.  
Rsm Chiran.

The procedure to be adopted in cases of this character is obvious ; first value the suit for payment of court-fees in accordance with the rule embodied in section 7, sub section (X) clause (c) of the Court-Fees Act ; then adopt the value so determined for the computation of court-fees, as the value for purposes of jurisdiction. There is a manifest danger of conflict between the provisions of the two statutes if the process is reversed ; in other words, the substance of the matter is that the valuation for assessment of court-fees controls the valuation for purposes of jurisdiction. I hold accordingly that in the present case the value for the purpose of payment of court-fees was correctly assessed at Rs. 32 under section 7 of the Court-Fees Act and that the value for the purpose of jurisdiction is consequently only Rs. 32 under section 8 of the Suits Valuation Act. This no doubt leads to the conclusion that the suit was not instituted in the Court of the lowest grade competent to try it, in contravention of section 15 of the Civil Procedure Code ; but section 11 of the Suits Valuation Act affords the plaintiffs adequate protection ; see also *Nidhi Lal v. Mazhar* (1) and *Matra Mondal v. Hari* (2) In my opinion, the memorandum of appeal bears the requisite amount of court-fees and must, if otherwise in order, be registered.

A. T. M.

*Appeal ordered to be registered*

(1) (1884) I. L. R. 7 All. 230

(2) (1889) I. L. R. 17 Calc. 155.

## APPELLATE CIVIL

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.*

CIVIL.

1921.

January, 27.  
February, 2, 3.  
April, 14.

BHARAT RAMANUJA DAS MOHANT.

v.

SARAT KAMINI DAS AND OTHERS\*

*Lis pendens—Transfer of Property Act (IV of 1882), Sec 52—'Contentious suit'—  
Consent decree.*

In order to determine whether a suit is contentious within the meaning of section 52 of the Transfer of Property Act, one has to consider whether it is contentious in its origin and nature : *Faiyas Husain v. Prag Narayan* (1). A consent decree falls within the scope of the rule of *lis pendens*.

\* Appeal from Original Decree No. 414 of 1915, against the decree of Babu Ambika Charan Majumdar, Subordinate Judge of Bankura, dated the 30th April, 1915.

1) (1907) L. R. 34 I. A. 102 ; I. L. R. 29 All. 339 ; 5 C. L. J. 563.



A decree is none the less a decree as defined by the Code of Civil Procedure, because it is based on a compromise, and the legal effects of the decree contemplated by order 23 rule 3 of the Code of Civil Procedure, do not differ from the legal effects of a decree where the suit has been fought to the end. When the Court makes a decree by consent, it performs not a ministerial but a judicial function; the Court must be satisfied that the agreement or compromise is lawful, and although the Court must record the entire agreement or compromise, it can pass a decree in accordance therewith only in so far as it relates to the suit. Consequently, the fact that a decree is given in accordance with terms which have been come to between the parties, does not prevent the decree from being the formal expression by the Court of an adjudication on a right claimed or a defence set up, conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit, within the meaning of the definition contained in section 2 (2) of the Code of Civil Procedure.

CIVIL

1921.

Bharat Ramanuja

Sarat Kamini.

Appeal by the Plaintiff,

Suit to enforce a mortgage security.

The material facts appear from the judgment of Mookerjee J.

*Mr. N. Sarkar, Dr. Jadu Nath Kanjilal, Babus Gopendra Nath Das and Rama Prosad Mookerjee* for the Appellant.

*Babus Bepin Behary Ghose, Sib Chandra Palit, Bankim Chandra Mukherjee and Panchanan Ghose* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

**Mookerjee, J.**—This is an appeal by the plaintiff in a suit to enforce a mortgage security, executed in his favour on the 14th September, 1906, by the first defendant, Raja Balabhadra Singh Deb, in respect of what is known as the Raipur zemindary. Besides the mortgagor, 85 other persons were made parties to the suit in the Court below, on the allegation that they were subsequent encumbrancers. They filed twelve separate written statements and raised numerous questions which were embodied in fourteen issues. We are now concerned with only one set of defendants, namely, defendants 8 to 19 who have been described in these proceedings as the Rathis and the Dutts. They set up a mortgage for Rs. 75,000 executed by the first defendant in their favour on the 28th January, 1908. They contended that the security held by them, though subsequent in point of time, had priority over the mortgage in suit, by the application of the doctrines of subrogation and *lis pendens*. The Subordinate Judge held that these defendants were entitled to the benefit of the rule of *lis pendens* but that the principle of subrogation was of no avail. In this view, the Subordinate Judge has

April, 14.

CIVIL

1921.

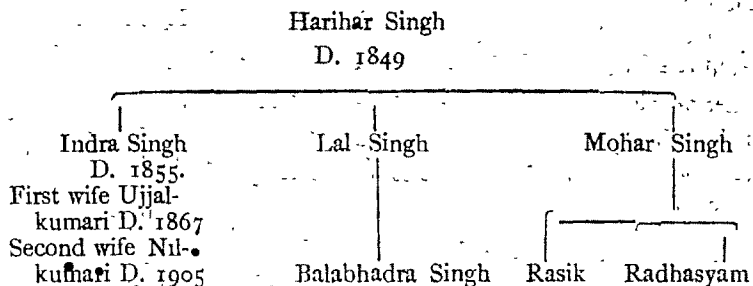
Bharat Ramanuja

Sarat Kamini.

Mookerjee, J.

granted the plaintiff a mortgage decree, subject to the mortgage in favour of the Rathi and the Dutt defendants to the extent of Rs. 71,000 only. On the present appeal, the plaintiff has contended that the rule of *lis pendens* is of no assistance to the defendants, who have not only controverted this argument but have also assailed the opinion expressed by the Subordinate Judge as to the inapplicability of the principle of subrogation. To elucidate the questions in controversy, it is necessary to explain the circumstances which led up to the mortgage set up by the Rathi and the Dutt defendants.

The Raipur zemindari, which is the subject matter of both the mortgages, originally belonged to one Harihar Singh whose name appears in the following genealogical table; it is alleged to have been an impartible Raj governed by the rule of primogeniture according to the custom of the country and the usage of the family :



Harihar Singh died in 1849, leaving three sons, Indra Singh, Lal Singh and Mohar Singh. Indra Singh, as the eldest, succeeded to the Raj, while his two brothers received maintenance. Indra Singh died in 1855, leaving him surviving his two widows and two brothers. The first widow Ujjalkumari died in 1867 and the second widow in 1905 after the death of both Lal Singh and Mohar Singh. On the 12th January, 1906, shortly after the death of Nilkumari, Balabhadra Singh instituted a suit (Suit No. 10 of 1906) for declaration of his title to the Raipur zemindari and for recovery of possession thereof from various persons including the Rathis and the Datts, who, he alleged, were wrongfully in occupation under titles created by Nilkumari. The Rathis and the Datts resisted the claim on the allegation that they had acquired an indefeasible title, first by purchase at a sale held on the 20th January, 1891, in execution of a decree, on a mortgage granted on the 22nd April, 1885, to one Tara-

chand Pal by Nilkumari and Mohar Singh, and then again by a purchase on the 20th January, 1892 in execution of a prior mortgage taken by one Kshetranath Mahapatra from the same mortgagors. The order sheet in that suit, which has been received in evidence in this litigation, makes it abundantly clear that the suit was contentious and was actively prosecuted by both sides during many months. When the issues had been framed, the suit was, after the usual adjournments, set down for trial on the 13th January, 1908; on that date, on the application of both parties, time was allowed to them till the 17th January, to compromise. On the date so fixed, it was recorded that the case had not been compromised, and the trial commenced. The hearing proceeded from day to day till the 23rd January when the case was adjourned in view of a "talk of compromise." Ultimately on the 28th January, 1908, a solenama (petition of compromise) was filed on behalf of the plaintiff Balabhadra Singh and the Rathi and the Dutt defendants as also an added defendant Brajalal Dutt. The Court accepted the petition of compromise, but could not forthwith make a decree on the basis thereof, as there were other defendants who had not compromised. The case was accordingly directed to proceed against the remaining defendants. On the 30th January, a solenama was filed on behalf of the plaintiff and another defendant and was accepted. The trial proceeded as against the other defendants who utilised, as appears from the order of the 14th February, 1908, the documents previously filed by the Rathi and the Dutt defendants. The proceedings were much prolonged and the hearing did not conclude till the 6th March, 1908, when judgment was reserved. On the 31st March, 1908, judgment was delivered, and the suit was decreed, "partly in terms of solenama and partly on contest." The decree thus made gave effect to the compromise embodied in the petition presented on behalf of the plaintiff and the Rathi and the Dutt defendants on the 28th January, 1908. The decree recites the terms of the compromise which now require examination.

The purport of the compromise was that the Rathi and the Dutt defendants relinquished in favour of the plaintiff whatever interest they had acquired in the Raipur zemindari, for a consideration of Rs. 71,000 which was secured by a mortgage of the zemindari, as the plaintiff was unable to pay the amount in cash. The petition of compromise recites that this mortgage bond had been executed on the same date to secure a sum of Rs. 75,000, made up of the aforesaid sum of Rs. 71,000 and an additional cash payment of Rs. 4,000. There is no room for controversy that the compromise

CIVIL.

1921.

Bharat Ramanuja

v.

Sarat Kamini.

Mookerjee, J.

CIVIL.

1921.

Bharat Kamanuja

v.

Sarat Kamini.

Mookerjee, J.

and the mortgage constituted one entire and indivisible transaction and that when the decree of the Court, made on the 31st March, 1908, gave effect to the compromise, it validated the whole contract between the parties inclusive of the mortgage. To take any other view would be to sacrifice substance to form and to disintegrate vital elements of the transaction which could not, in the contemplation of the parties, have ever been regarded as other than inseparable in character. The question thus emerges for consideration, whether the mortgage in suit, executed on the 14th September, 1906, after the institution on the 12th January, 1906, of Suit No. 10 of 1906 for determination of the title to the hypothecated property, is affected, by virtue of the rule of *lis pendens*, by the consent decree in the title suit dated the 31st March, 1908, which incorporated and gave effect to the mortgage of the 28th January, 1908. The Subordinate Judge has answered this question against the plaintiff and we have now to consider whether his conclusion is well founded on principle.

The rule of *lis pendens* is enunciated in section 52 of the Transfer of Property Act in the following terms :

"During the active prosecution, in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

The decision of the Judicial Committee in *Faiyaz Husain, v. Prag Narayan* (1), shows that in order to determine whether a suit is contentious within the meaning of this section, we have to consider whether it is contentious in its origin and nature. The expression "contentious suit" must then be held to be used in contradistinction to a collusive suit in which there is no contest, a suit of the nature described by Lord Brougham in *Bandon v. Beecher*. (2).

"A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these qualities, not one takes place in the case of a fraudulent and

(1) (1907) L. R. 34 I. A. 102 ; I. L. R 29 All 339 ; 5 C. L. J. 563.

(2) (1835) 3 Cl. & F. 479.

collusive suit ; there is no Judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him ; there is no party litigating, there is no party defendant, no real interest brought into question”.

If a suit is not collusive, it cannot be maintained that, though originally contentious, it ceases to be contentious because it is compromised by the act of the parties. This view is supported by the decision of a Full Bench of the Madras High Court in *Annamalai v. Malayandi* (1) where it was ruled that the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such suit or proceeding is subsequently compromised, and a decree is passed in pursuance of such compromise not tainted by fraud or collusion. The view was followed in the case of *Mati Lal v. Preeto Nath* (2) where Doss J, quoted with approval the following observation of Chancellor Searls of the Supreme Court of California in *Partridge v. Shephard* (3) “ We know of no good reason why a judgment entered by consent of parties, in a cause in which the Court has jurisdiction of the subject matter and of the parties, is less efficacious than if entered after a trial of the suit. It may be impeached like any other judicial record by evidence of a want of jurisdiction in the Court rendering it, by showing collusion between the parties or by proof of fraud on the part of the party offering the record.” The same position was affirmed in the case of *Tinoodhan v. Trailokhya* (4) and had been recognised in the earlier decisions in *Naduroonissa v. Ahgür Ali* (5) *Raj Kishen v. Radha Madhub* (6) and *Mondhur v. Hurryhur* (7). A similar opinion was expressed by Jenkins, C. J., in *Krishnappa v. Shlvappa* (8). As was pointed out by Subrahmanya Ayyar J. in *Annamalai v. Malayandi* (1), the generality of the word “under any decree or order made therein” in section 52 of the Transfer of Property Act, upon their face, lend no support to the argument that a consent decree does not fall within its scope. It is well-known that a judgment by consent or default is as effective as an estoppel between the parties as a judgment, whereby the Court exercises its

CIVIL.

1921.

Bharat Ramanuja

Sarat Kamini.

Mookerjee, J.

(1) (1905-6) I. L. R. 29 Mad. 426.

(2) (1908) 9 C. L. J. 96 ; 13 C. W. N. 226.

(3) (1886) 71 Cal. 470; 13 Pacific 480.

(4) (1912) 17 C. W. N. 413.

(5) (1867) 7 W. R. 103. (6) (1874) 21 W. R. 349.

(7) (1879) 3 Shome 23.

(8) (1907) I L. R. 31 Bom. 393.

CIVIL.

1921.

Bharat Ramanuja

v.

Sarat Kamini.

Mookerjee, J.

mind on a contested case ; see *In re South American and Mexican Co.* (1) ; *The Belcairn* (2) ; *Nicholas v. Asphar* (3) ; *Rajlakshi v. Katyayani* (4) ; and this is so, even though, as pointed out in *Wentworth v. Bullan* (5) and in *Huddersfield Banking Co. v. Lister* (6), the consent order is in essence only the order of the Court carrying out an agreement between the parties. The essence of the matter is that a decree is none the less a decree as defined by the Code of Civil Procedure, because it is based on a compromise, and the legal effects of the decree contemplated by order 23, rule 3 C. P. C. do not differ from the legal effects of a decree where the suit has been fought to the end. When the Court makes a decree by consent it performs not a ministerial but a judicial function ; the Court must be satisfied that the agreement or compromise is lawful, and although the Court must record the entire agreement or compromise, it can pass a decree in accordance therewith only in so far as it relates to the suit. Consequently, the fact that a decree is given in accordance with terms which have been come to between the parties does not prevent the decree from being the formal expression by the Court of an adjudication on a right claimed or a defence set up, conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit, within the meaning of the definition contained in section 2 (2) C. P. C. Section 96 (3), on the other hand, makes it clear that a decree passed with the consent of parties is a decree within the meaning of the Code. It may also be maintained that unless a compromise is collusive, the very fact that there is a compromise shows that the suit was in its origin and nature contentious, otherwise there would be nothing to compromise. In our opinion, a consent decree falls within the scope of the rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act. A similar view was adopted in the case of *Landon v. Morris* (7), where Shadwell V. C. held that a decree taken *pro confesso* was binding on a purchaser who had entered into a contract after the filing of the bill, and this was subsequently approved by Lord Brougham L. C. See also *Windham v. Windham* (8). A similar rule has been recognised and frequently applied in the Courts of the United States, not as based on peculiarities of statutory pro-

(1) (1895) 1 Ch. 37. (2) (1885) 10 P. D. 161.

(3) (1896) 1 L. R. 24 Calc. 216.

(4) (1910) 1 L. R. 38 Calc. 639 (674).

(5) (1829) 9 B. &amp; C. 840.

(6) (1895) 2 Ch. 273.

(7) (1832) 2 L. J. Ch. 35 ; 5 Sim. 247.

(8) (1667) 2 Freeman 127 ; 2 Eq. Cas. Abr. 280.

visions but as founded on well-established principles of public policy, namely, that the plaintiff would be liable to be defeated by the defendant's alienation before the consent judgment or decree and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. On this ground it has been repeatedly ruled that one acquiring interest *pendente lite* in a proceeding which is *lis pendens* is bound by the decree without regard to its form, or whether it is erroneous, and it is immaterial that the relief granted in the suit is the result of agreement or compromise, except where it is the result of fraud or collusion between the parties; *Norris v. Ile* (1); *Mc Ilwraith v. Hollander* (2); *Partridge v. Shephard* (3); *Turner v. Babb* (4).

Reliance has finally been placed on behalf of the appellant upon the rule enunciated in the the following terms by Sir Richard Couch C. J. in *Kailas v. Fulchand* (5), as to the liability of a purchaser *pendente lite*: "With regard to the question of *lis pendens*, the doctrine appears to be this, that the alienee is bound by the proceedings in the suit after the alienation and before he becomes a party. Then the question is, by what proceedings in the suit is he bound? Is he bound by the proceedings which arise from the nature of the suit, and from the case set up, and the relief prayed in the bill, or, is he to be bound by any order which the Court may be induced by the parties to make in the course of the suit? I can find no authority which goes to the extent of saying that, because he does not think fit to become a party to the suit, he is to be bound by any order, whatever that may be made. It seems to me that he ought only to be bound by proceedings which, from the nature of the suit, and the relief prayed, he might expect would take place; and if there had been no notice in this case, it might have been necessary for us to determine what is the precise effect of *lis pendens*. But this need not now be determined. Practically, there is no substantial difference between *lis pendens*, and having notice of the suit. He would be equally bound by them, and not more by one than by the other."

These observations were quoted with approval by Pontifex, J. in *Kasumunnissa v. Nilratna* (6), and by Banerjee, J. in *Kishori*

CIVIL.

1921.

Bharat Ramanuja

v.

Sarat Kamini.

Mookerjee, J.

(1) (1894) 152 Ill. 190; 43 Am. St. Rep. 233]

(2) (1880) 73 Missouri 105; 39 Am. Rep. 484.

(3) (1886) 71 Cal. 470; 12 Pacific 480.

(4) (1875) 60 Missouri 342.

(5) (1871) 8 B. L. R. 474 9).

(6) (1881) 1 L. R. 8 Cal. 79 (85).

CIVIL.

1921.

Bharat Ramanuja

v.

Sarat Kamini.

Mookerjee, J.

*Mohun v. Mahomed Mujaffar* (1), which, it may be noted, was decided on another ground on appeal to the Judicial Committee; *Mahomed v. Kisori* (2). With regard to the rule enunciated by Couch, C.J. in *Kailas v. Fulchand* (3), two points must not be overlooked. In the first place, the case was decided long before the Transfer of Property Act was placed on the Statute Book, and it would be opposed to well-recognised principles of construction of Statutes to attempt to engraft on section 52 qualifications or restrictions not justified by its language but discoverable from pre-existing judicial pronouncements. Such an attempt would be open to emphatic condemnation; see the judgment of Lord Herschell in *Bank of England v. Vagliano Bros* (4), and the judgment of the Full Bench of this Court in *Uttam Chandra v. Raj Krishna* (5). In the second place, as has been frequently pointed out, for example in *Annamalai v. Malayandi* (6) and *Tinoodh in v. Trailokhya* (7), the rule laid down by Couch, C. J. is not in accord with the earlier decision of this Court in *Naduroonissa v. Aghur Ali* (8), and indeed a different rule was subsequently laid down by Couch, C. J., himself in the case of *Raj Ki hen v. Radh's Muddhub* (9) where the doctrine of *lis pendens* was applied to a purchase pending a suit which terminated in a consent decree.

But, if notwithstanding the comprehensive terms of section 52 of the Transfer of Property Act, we adopt the restricted rule enunciated by Sir Richard Couch in *Kailas v. Fulchand* (3), and embark upon an enquiry as to whether the decree made by consent was such as the plaintiff might, from the nature of the suit and the relief prayed for therein, expect would take place, the result is of no avail to him. The decree which was actually made on compromise was in essence a decree which might, even after contest, have been made in favour of the plaintiff in that suit (now the first defendant in this litigation). He sought to recover the Raipur zemindari on the allegation that the Rathis and the Dutts were in occupation under a title inoperative against him because created by a limited owner; as Nilkumari was, with or without the concurrence of a future possible claimant in the position of Mohar Singh. A suit of this description may well be regarded as a case of excessive alienation by a limited

(1) (1890) 1 L. R. 18 Calc. 188.

(2) (1895) L. R. 22 I. A. 129; 1 L. R. 22 Calc. 909.

(3) (1871) 8 B. L. R. 474.

(4) (1891) App. Cas. 107 (145).

(5) (1919) 1 L. R. 47 Calc. 377; 31 C. L. J. 98 (118); 24 C. W. N. 229.

(6) (1905-6) 1 L. R. 29 Mad. 426.

(7) (1912) 17 C. W. N. 413.

(8) (1867) 7 W. R. 103.

(9) (1874) 21 W. R. 349.



owner, and may terminate in a decree for possession in favour of the ultimate owner, subject to resoupment, partial or entire, of the advances made by the creditor. Instances of such decrees may be found in the decisions of the Judicial Committee in *Samsul v. Sebakram* (1); *Deputy Commissioner of Kheri v. Khanjan Singh* (2) and *Bhagbat Dayal v. Debi Dayal*, (3). The substance of the matter is that the compromise decree was of the same type as the conditional decree such as may be and is often made in suits by reversioners, where the alienation by a limited owner is set aside on equitable terms. We are of opinion consequently that even according to the test formulated by Sir Richard Couch, the plaintiff must be held bound by the doctrine of *lis pendens*.

If, then, there is no escape from the conclusion that the plaintiff is bound by the rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act, the mortgage created in his favour by the first defendant on the 14th September, 1906, after the latter had instituted the suit for establishment of title on the 12th January, 1906, must be deemed to have been affected by the consent decree made therein. That decree gave effect to the mortgage of the 28th January, 1908, which was a component part of the decree, even though not made enforceable thereby. This is clear from decisions of the Judicial Committee in *Pranal Annee v. Lakshmi Annee* (4) and *Hemantakumari v. Midnapore Zemindari Co.* (5). Indeed, to validate the mortgage in favour of the plaintiff, quite as much as the mortgage in favour of the Rathis and the Dutts, it was essential that the title of the mortgagor should be established, and that result was accomplished only by the consent decree of the 31st March, 1908, which affirmed the agreement of the 28th January, 1908, inclusive of the mortgage comprised therein as an integral component element. As between the plaintiff and his mortgagor (the first defendant) the principle of estoppel may apply and the after-acquired title of the mortgagor may be made to inure to the mortgagee, but the case is otherwise as between the first defendant and the Rathis and the Dutts mortgagees. The case of a mortgage given back by the purchaser to the vendor of an estate stands upon a footing of its own. While it is true that where money is loaned or something equivalent done, upon the

## CIVIL.

1921.

*Bharat Ramanuja*  
v.  
*Sarat Kamini.*  
*Mookerjee, J.*

(1) (1874) L. R. 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226.

(2) (1906) L. R. 34 I. A. 72; I. L. R. 29 All. 331; 5 C. L. J. 344.

(3) (1908) L. R. 35 I. A. 48; I. L. R. 35 Calc. 420; 7 C. L. J. 335.

(4) (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508.

(5) (1919) L. R. 46 I. A. 240; I. L. R. 47 Calc. 485; 31 C. L. J. 298.

CIVIL.

1921.

Bharat Ramanuja

Sarat Kamini.

Mookerjee, J.

security of a mortgage in fee with general warranty, the mortgagor cannot set up an after-acquired estate against the unsatisfied mortgagee; it is equally true that where the transaction is simply a purchase, with such mortgage back to secure payment of the purchase money, the rule does not apply. We are consequently of opinion that the Subordinate Judge has correctly held that the mortgage in suit must be postponed to the mortgage in favour of the Rathis and the Dutts. The plaintiff, it is satisfactory to find, cannot make a real grievance of this conclusion; for, as the Subordinate Judge has observed, there is overwhelming evidence that the compromise was brought about by the plaintiff himself; it was he who was the virtual plaintiff in the other suit in the cloak of Balabhadra and employed his own men and money actively to prosecute the suit. The compromise which he thus brought about included the mortgage with its express recital that the charge thereunder would have priority over all other charges. The plaintiff cannot now very well complain when it transpires that this is precisely the result of the application of the rule of *lis pendens*.

In view of our decision upon the question of *lis pendens*, it is unnecessary to express an opinion upon the question of the applicability of the principle of subrogation, which has not received adequate consideration from the Subordinate Judge. We may add that if it were necessary to determine the question of subrogation, a fuller investigation of the relevant facts than what is contained in the judgment of the lower Court would be essential.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. The cross-objections cannot be seriously maintained and are dismissed without costs.

**Buckland J.**—I agree.

A. T. M.

*Appeal and cross-objections dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

LUCHIRAM MOTILAL

v.

RADHA CHARAN PODDAR AND OTHERS.\*

CIVIL.

1921.

March, 10, 11, 18.  
April, 14.

*Evidence, admissibility of—Insolvent, admission of—Omission to object to reception of evidence, effect of—Evidence Act (I of 1872), section 154—Party called as witness by opposite party—Cross-examination—Hostile witness—Court's decision to rest on what.*

The admissions of an insolvent, if made after the act of insolvency, may be admissible against himself, but they cannot furnish evidence against another insolvent or as against the official assignee.

The erroneous omission to object to the reception of evidence, does not make it legally admissible in evidence : *Miller v. Madho Das* (1).

A party when called by his opponent, cannot, as of right, be treated as hostile, the matter being solely in the discretion of the Court.

A witness who is unfavourable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court : *Coles v. Coles* (2) and other cases.

The Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony : *Mina Kumari v. Bijay* (3).

Appeal by the Plaintiff.

Suit for declaration.

The material facts appear from the judgment of Mookerjee, J.

*Babus Manmatha Nath Mukerjee* and *Satis Chandra Munshi* for the Appellant.

*Dr. Dwarka Nath Mitter*, *Babus Satindra Nath Mukerjee* and *Narain Chandra Kar* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

**Mookerjee, J.**—This appeal arises out of a suit commenced by the appellants for declaration that two mortgages for Rs. 5,000 each taken by the first two defendants, Radha Charan Poddar and Radha-ballav Poddar, one from Lalbihari Saha (now deceased) on the 30th

April, 14.

\* Appeal from Original Decree No. 119 of 1919, against the decree of Babu Rajendra Lal Sadhu, Subordinate Judge of Pabna, dated the 12th February, 1919.

(1) (1895) L. R. 23 I. A. 1063; I. L. R. 19 All. 76.

(2) (1866) L. R. 1 P and D 30.

(3) (1916) L. R. 44 I. A. 72; I. L. R. 44 Calc. 662; 25 C. L. J. 508.

## CIVIL.

1921.

Luchiram

Radha Charan

Mookerjee, J.

January, 1914, and the other from Sukhlal Saha, Matilal Saha and Nriyalal Saha on the 7th February, 1914, had been made gratuitously with intent to defeat their creditors and were consequently voidable under section 53 of the Transfer of Property Act. The plaintiffs are creditors of the Sahas and instituted this suit on the 9th March, 1918, on behalf of themselves and the other creditors whose names were set out in a schedule appended to the plaint. The mortgagors as also the mortgagees were made defendants; and as the Sahas had been adjudicated insolvents on the 23rd July, 1914, by this Court in the exercise of its Insolvency Jurisdiction, the official assignee also was joined as a defendant. The suit was thus constituted as a representative suit of the type contemplated in the case of *Hakim Lal v. Mooshahar Sahu* (1), which was affirmed by the Judicial Committee in *Musahar Sahu v. Hakim Lal* (2). The case for the plaintiffs is that after the Sahas had been adjudicated insolvents, they proved their claim before the official assignee in due course. On the 4th April, 1916, three of the insolvents, Krishnalal Saha, Matilal Saha and Nriyalal Saha were publicly examined before the Registrar in Insolvency. In the course of such public examination, it was elicited that they had executed the mortgages now in suit in favour of their relations. The plaintiffs intended to apply for an order under section 55 of the Presidency Towns Insolvency Act for avoidance of the mortgages as against the official assignee. But before the termination of the insolvency proceedings, they discovered that the mortgagees had obtained decrees on the mortgages on the 15th March, 1917, against the mortgagors and the official assignee. They have consequently been constrained to institute the present suit, as otherwise complications might result if the decrees should be executed and the hypothecated properties should on sale pass into the hands of strangers. The claim was resisted by the mortgagors and mortgagees defendants, in other words, by the Sahas and the Poddars. The official assignee supported the plaintiffs and stated that he was not aware of the fraudulent character of the mortgages at the time when the mortgage decrees were made and he could not accordingly take steps to defend those suits. On these pleadings, the substantial question in controversy was formulated in the eighth issue in the following terms :

"Were the mortgages in question executed by the insolvents without consideration and were they executed *mala fide* and

(1) (1907) I. L. R. 34 Calc. 999 ; 6 C. L. J. 410.

(2) (1915) L. R. 43 I. A. 104 ; 1 L. R. 43 Calc. 521 ; 23 C. L. J. 406.

fraudulently as shields against their creditors as stated in the sixth and eighth paragraphs of the plaint".

The Subordinate Judge held on the evidence that the plaintiffs had failed to discharge the burden which lay upon them to prove that the mortgages were fraudulent; he further found that the defendants had established that the mortgages were for consideration. On the present appeal, the arguments have centred round the question, whether the mortgages were gratuitous or for consideration.

At an early stage of the arguments, it transpired that certified copies of the record of the public examinations of Matilal Saha, Nrityalal Saha and Krishnalal Saha were received in evidence by the Subordinate Judge. None of these persons had however been examined as witnesses in the lower Court, and consequently their previous statements could not be taken to have been utilised to contradict them. The question thus arose, whether the statements in the Insolvency proceedings could have been received in evidence under either section 32 or section 33 of the Indian Evidence Act. Section 32 was of no avail, because even if it were assumed that the requirements of the introductory clause were satisfied, the case could not be deemed covered by any of the eight clauses. The clause which looked most helpful was the third, but this, it was conceded, was useless, as the statements were not against the pecuniary or proprietary interest of the persons making them. Section 33 was equally of no assistance, because even if it were assumed that the requirements of the introductory clause were fulfilled, none of the three conditions mentioned in the proviso could be held to have been realised. The Insolvency proceeding could not be treated as a proceeding between the same parties as the parties to the present suit. Nor could it be said that the adverse party in the first proceeding had the right and opportunity to cross-examine or that the questions in issue were substantially the same in the first as in the second proceeding. The scope of the public examination of the insolvent, as indicated in section 27 (i) of the Presidency Towns Insolvency Act, is to examine him as to his conduct, dealings and property. At that stage, the creditors who may have been notified are arrayed together; no question arises whether there is a conflict between secured and unsecured creditors or whether the alleged claim of one or other of them is or is not fraudulent. They cannot at the time be treated as adverse parties, nor can the question in issue in this suit be deemed by any stretch of language to be substantially the same as the question then in issue. There is the additional difficulty that the statement of one of the insolvents could not by any device be used as against another or the

CIVIL

1921.

Luchiram

Radha Charan.

Mookerjee, J.

CIVIL.

1921.

Luchiram

Radha Charan.

Mookerjee, J.

others. The admissions of an insolvent, if made after the act of insolvency, may be admissible against himself, but they cannot furnish evidence against another insolvent or as against the official assignee. Reference may in this connection be made to the decision in *In re Brunner* (1), where it was ruled that the answers of a bankrupt on his public examination are not admissible in evidence even in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt. There was thus no escape from the position that the statements made by Krishnalal Saha, Matilal Saha and Nirtyalal Saha in the course of their public examination under section 27 (1) of the Presidency Towns Insolvency Act were not admissible in evidence in this suit. When we indicated our view on this point, Mr. Mukerjee on behalf of the plaintiffs requested that steps might be taken to examine these three persons in this Court. We decided to accede to this request, although we were not unmindful of the observations made by the Judicial Committee as to the reception of additional evidence in appeal in the case of *Kessowji Issur v. G. I. P. Ry.* (2). We were, however, largely influenced in our decision by the circumstance that some endeavour had been made to examine the insolvents in the Court below, but the attempt proved infructuous as the witnesses could not be found and the warrants could not consequently be executed. No doubt, all the steps which might possibly have been taken to enforce attendance were not exhausted, but this might have been due to the fact that the previous statements were allowed to be received in evidence without objection. The erroneous omission to object to the reception of the evidence did not, as pointed out by the Judicial Committee in *Miller v. Madho Das* (3) make it legally admissible in evidence; but as such omission might possibly have induced the plaintiff not to take recourse to the extreme measures provided for the enforcement of attendance of witnesses, we thought it right to summon them for examination in this Court. Two of them, Matilal Saha and Nirtyalal Saha, did attend in obedience to the subpoena issued by this Court; Krishnalal Saha did not attend and it was stated that his absence was due to illness. But when the witnesses appeared in Court, Mr. Mukerjee declined to examine them in chief, on the ground that as his clients were plaintiffs and the witnesses were mortgagors defendants, they were bound to be hostile. He accordingly asked that they might be treated as witnesses

(1) (1857) 19 Q. B. D. 572.

(2) (1907) L. R. 34 I. A. 115; I. L. R. 31 Bom. 381; 6 C. L. J. 5.

(3) (1896) L. R. 23 I. A. 106; I. L. R. 19 All. 76.

called by the Court and that he might be permitted to cross-examine them. In support of this position, he placed reliance upon the decision of the Judicial Committee in *Radha Jeobun v. Taramonze* (1). That decision is of no assistance to the appellant. There the witnesses summoned for the plaintiff (except one) did not appear. The plaintiff thereupon filed a petition praying that the case might be decided by his summoning the defendant in person and taking his deposition. The defendant was accordingly summoned and was asked by the Court whether the money claimed by the plaintiff was justly due from him or not. The defendant answered that he was not liable for the claim. The plaintiff then submitted that he had not intended to abide by the answer of the defendant and asked leave to cross-examine him. The trial Judge refused to put any further questions to the defendant or to allow any to be put on behalf of the plaintiff and dismissed the suit. On appeal to this Court, Morgan and Pandit, JJ. expressed their disapproval of the course adopted by the trial Judge, and when the case went up to the Judicial Committee, their Lordships fully concurred in the propriety of that censure. This is clearly no authority for the proposition that if the plaintiff calls the defendant as a witness, he is entitled to cross-examine him as a matter of right; in the case before the Judicial Committee the defendant was treated as a witness called by the Court. If the contention of the appellants were to prevail, it would involve in substance an approval of the procedure condemned in emphatic terms by the Judicial Committee in two recent cases. In *Kisori Lal v. Chuni Lal* (2), Lord Atkinson observed as follows :

"It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

Reference may also be made in this connection to the decision

(1) (1869) 12 M. L. A. 380; 2 B. L. R. 79 P. C.; 11 W. R. P. C. 31.

(2) (1908) L. R. 36 I. A. 9; 1 L. R. 31 All. 116; 13 C. W. N. 370; 9 C. L. J. 172.

CIVIL.

1921.

"Luchiram

v.

Radha Charan.

Mookerjee, J.

CIVIL.

1921.

Luchiram

Radha Charan.

Mookerjee, J.

of the Judicial Committee in *Lal Koer v. Chitranji Lal* (1); see also *Venkata v. Pappaya* (2); *In re Rangaswami Iyengar* (3). The matter must plainly be decided under section 154 of the Indian Evidence Act which gives the Court a discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. The rule recognised in *Clarke v. Saffery* (4), and *Bastin v. Carew* (5), namely, that when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, when a defendant is called as the plaintiff's witness, the party calling the witness is entitled to cross-examine him, cannot be held applicable in this country in view of the provisions of section 154 of the Indian Evidence Act. Indeed, even in England, it has been ruled in later cases that the situation in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him, unless the witness' evidence be of such a nature as to make it appear that the witness is unwilling to tell the truth; *Parkin v. Moon* (6); *R v. Ball* (7), and it now appears to be settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court; *Price v. Manning* (8). We must further remember that a witness who is unfavourable is not necessarily hostile, for a hostile witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court; *Coles v. Coles* (9); *Greenough v. Eccles* (10); *Surendra Krishna v. Rani Dasi* (11). The position, consequently, is that although Matilal Saha and Nityalal Saha were present in this Court, the plaintiffs did not examine them. We are thus left with the evidence adduced in the Court below, after the depositions of the insolvents before the Registrar in Insolvency have been excluded therefrom. Upon that evidence, there is no room for serious argument that the decision of the Subordinate Judge must be upheld. He has referred in detail to the oral evidence to show that the mortgages were for considera-

(1) (1909) L. R. 37 I. A. 1, I. L. R. 32 All. (104); 14 C. W. N. 285; 11 C. L. J. 172.

(2) (1913) Mad. W. N. 838.

(3) (1913) Mad. W. N. 998.

(4) (1824) R & M. 126.

(5) (1824) R. & M. 127.

(6) (1836) 7 C. & P. 408.

(7) (1839) 8 C. & P. 745.

(8) (1889) 42 Ch. D. 373.

(9) (1866) L. R. 1 P & D 70.

(10) (1859) 5 C. B. N. S. 786; 116 R. R. 865.

(11) (1920) I L. R. 47 Calc. 1043 (1057); 33 C. L. J. 34 (50)



tion and that oral testimony is largely supported by the account books. As regards the mortgage of the 30th January, 1914, he has found that Lalbihari Saha had borrowed Rs. 4,000 from the first two defendants on the occasion of the marriage of his son in 1913, and executed a promissory note for the amount. The mortgage was granted to secure the sum due on the note and a subsequent advance of Rs. 440. As regards the mortgage of the 7th February, 1914, the Subordinate Judge has found that it was granted to secure a prior loan of Rs. 3,000 taken in 1908. The oral evidence and the extracts from the account books have been placed before us and carefully commented upon. We see no reason to doubt the correctness of the conclusion of the Subordinate Judge that both the mortgages were for consideration and he, in our opinion, properly declined to decide in favour of the plaintiff on mere grounds of suspicion, for as Sir Lawrence Jenkins said in *Mina Kumari v. Bijay Singh*, (1) the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs,

**Buckland, J.**—I agree.

A. T. M.

*Appeal dismissed.*

(1) (1916) L. R. 44 I A. 72; I. L. R. 44 Calc. 662; 25 C. L. J. 508.

## PRIVY COUNCIL.

PRESENT: Lord Buckmaster, Lord Shaw, and Sir John Edge.

GHULAM ABBAS KHAN AND ANOTHER.

v.

MUSAMMAT AMATUL FATIMA AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH].

*Oudh taluqdars—Primogeniture sanads—Construction—"Successors", meaning of—Limited to succession ab intestate—Oudh Estates Act (I of 1869).*

The ordinary form of sanad granted to the Oudh taluqdars provides that in

CIVIL.

1921.

Luchiram

v.  
Radha Charan,

*Mookerjee, J.*

P. C.

1921.

January, 25, 27.  
March, 1.

P. C.  
1921.  
Ghulam Abbas  
v.  
Amatul Fatima.

the event of the grantee or any of his successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture.

*Held*, that "successors" in this connection is equivalent to heirs, is confined to those who succeed to the estate by virtue of the grant, and does not include those who take the whole or part thereof through alienation.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated July 5, 1915, affirming a decree of the Subordinate Judge of Mohanlalganj.

The main question raised by this appeal and this only one decided by the Board, was whether or not on the true construction of the sanad in the case, which was in the ordinary form of primogeniture sanad, the rule of primogeniture therein provided applied to all persons who came into possession of the estate.

The facts are sufficiently stated in their Lordships' judgment. The two rival claimants were the first born son of a daughter and the son of the eldest daughter respectively. Their suits were both dismissed by the lower Courts.

*De Gruyther, K. C.* and *E. B. Raikes* for Appellants in first appeal.

*Sir Erle Richards K. C.* and *Parikh* for Appellants in second appeal.

*Clauson K. C.* and *Kenworthy Brown* for Respondents 3 to 6.

*De Gruyther K. C.* for Appellants in first appeal: Submitted that the succession was governed by the sanad. This is now settled by *Sheo Singh v. Raghubans Kumwar* (1). That case shows that the sanad establishes a permanent rule of succession, and not merely intestate succession. The word "successors" includes successors by devise: it is not limited to intestacy. When these sanads were granted, the intention, as set out at length in Sykes's Compendium of Oudh Taluqdari Law, was to prevent the splitting up of estates. They lay down a rule which is to apply not merely to the original holder, but to his successors.

[Sia John Edge: A Mahomedan gentleman might devise to a Hindu money-lender. Would he be a successor?]

I think so.

[Sir John Edge: It may be, but I do not think Government could have intended it.]

Here you have the whole estate bequeathed to a member of the

family who would at least have got part under the ordinary Mahomedan law.

[*Lord Buckmaster*. The question was not, it seems, considered in *Sheo Singh v. Raghunath Kunwar* (1), so as a decision to guide us it is of little use.]

"Successor" must at least include the succession to the whole family estate by a member of the family.

*Parikh* (who was allowed to follow on the same side): The will by which Sughra Bibi bequeathed to Akbar Ali Khan was admittedly made at the instance of the Chief Commissioner. This shows that it was not considered that a devise would defeat the policy of the Government.

*Clauson K. C.* for Respondents 3-6: There are two points fatal to appellants: (a) "successor" in the sanad means successor *ab intestate*; (b) they cannot show they are male heirs i. e. males establishing their title through males.

[*Lord Buckmaster*: That second contention might be dangerous for you, as you do not make out your title through males.]

We are in possession and it is for them to prove their own title. As to (a) I say successor means one who comes in by force of the existence of the estate with no interruption. Successor might mean (1) *ab intestate* (2) any holder of the estate (3) something intermediate. Admittedly (2) is impossible. I submit successor cannot include transferees. One would not expect that the old limitation would apply to quite new people. It is not necessary to bar transfers altogether, but I would suggest that at all events a transfer outside the line marked out by the sanad breaks the successory limitation provided therein. Elahi Khanam was outside the circle: on no hypothesis could "heir" include the widow.

*D. Gruyther* replied. Alienate includes adoption, and if any alienation is to break the line of succession, the adopted son would be free from all restrictions and would not be a successor, even though he took on an intestacy. Next, if "successor" had that limited meaning, each grantee could get rid of all limitations by devising to his next heir. The intention that till the estate was alienated it should devolve in the particular way laid down. The sanad should be construed liberally so as to give effect to its true intent.

(The question as to the priority in right *inter se* of the two appellants was afterwards argued but the arguments are not reported as no decision was given.)

(1) (1905) L. R. 32 I. A. 203.

P. C.

1921.

Ghulam Abbas

Amatul Fatima.

P. C.

1921.

Ghulam Abbas

v.  
Amatul Fatima.

March, 1.

Their Lordships' judgment was delivered by

**Lord Buckmaster.**—These are two consolidated appeals (Nos. 200 and 201 of 1919), arising out of two suits, brought by different plaintiffs for the purpose of determining the rights of succession to a property known as the Maniarpur Taluka.

Several subordinate questions arise upon these appeals, but they are dependent upon the success of the appellants in their contention that, according to the true construction of a sanad granted in 1864 to a lady called Sughra Bibi, the rules relating to primogeniture which that sanad established apply to all persons who come into possession of the estate, whether by gift, devise, purchase or descent.

The facts which give rise to this dispute can be shortly stated. Sughra Bibi died on the 11th November, 1865, having by will given the whole talukdari estate to one Akbar Ali Khan, who was the youngest of her four half-brothers. Akbar Ali Khan had no male issue, and partly by a deed of gift and partly by bequest he disposed of the whole of the property in favour of his wife Ilahi Khanam. She died on the 20th April, 1899, leaving six daughters, who are six respondents, and a number of grandsons by such daughters, of whom Agha Mohammad Jafar, the appellant in appeal 201 of 1919, is the son of the eldest daughter; Babu Ghulam Abbas Khan, the appellant in the other appeal, being the eldest of the grandsons by a younger daughter. If, according to the true construction of the document, the successors on whom the right of primogeniture is imposed do not include those who being outside the line of descent succeeded by the operation of a devise, the appellants fail; this has been the decision of one of the Judicial Commissioners and of the Subordinate Judge, the other Judicial Commissioner deciding for other reasons that the appellants were not entitled.

The relevant terms of the document are as follows:

"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Hon'ble the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udney Yule, Officiating Chief-Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right title and possession of the estate of Maniarpur. . . . Therefore this sanad is given you in order that it may be known to all whom it may concern that the above estate has been conferred upon you and your

heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions . . . It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest or adoption to whomsoever you please. It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

From this it will be seen that the estate was granted in a form intended to secure the succession of the nearest male heir according to the rule of primogeniture, but that at the same time free power of disposition was reserved to all who became possessed of the estate.

The construction of the document is rendered difficult by the use of words that have, according to English law, a well-known meaning and implication which in the circumstances of the grant it would not be right to apply without qualification to the document in question.

The circumstances in which the grant was made are relevant considerations, and they are fully set out in Sykes' Compendium of Oudh Talukdari Law, referred to in the judgments of the Subordinate Judge.

From this it is apparent that it was the object of the Government to associate possession of the Taluqdari estate in its entirety in the hands of the taluqdars, with the honour and dignity of the family whose title should be transmitted to the nearest male heir. It was something remotely akin to an estate in tail male according to English law, but the kinship was not close because a power of alienation, unknown to an English estate tail, unless the entail is destroyed, was an essential part of the document. The conditions imposed as to loyalty and obedience to the British Government were obviously intended to have reference to those who took under the grant, and this is a relevant consideration in determining what the true meaning of the word "successors" may be, for if it bore the meaning which it is obviously capable of supporting, of any form of succession, it would follow that whoever bought the estate under any circumstances would be subject to the same restrictions. If, however, the estate

P. C.

1921.

Ghulam Abbas

v.

Amatul Fatima.

• Lord Buckmaster.

P. C.

1921.

Ghulam Abbas.

Amatul Fatima.

Lord Buckmaster.

were at any time alienated into the hands of people living in a totally different district and under totally different conditions, the reason for these provisions would at once disappear. Again, "successors," without some limitation, would include all those who succeeded to any part of the estate, and as the power of disposition clearly and in express language contemplates the power of breaking the estate up by the act of any holder for the time being, such an event might easily arise and the object of securing an undivided holding in a family whose loyalty was rewarded by security of possession would be defeated. It would, therefore, be unreasonable to assume that the estate if sold should be subject in the hands of any purchaser to the conditions which as to descent and loyalty had their origin in circumstances which would no longer apply.

Their Lordships, therefore, reject the view that the word "successors" can in this sanad be subject to the liberal construction for which the appellants contend. But if this view be rejected, the document does not permit any other interpretation of the word except that of succession according to the terms of the sanad itself. The estate is in the first instance given to Sughra Bibi and her heirs for ever. The heirs there cannot mean any person outside the line of defined succession, for to such people no such grant was made, nor, so far as the grant is concerned, were they contemplated in any way as succeeding. That phrase, therefore, must be taken to mean that the estate was an absolute estate conferred upon the grantee, and it is upon her and her nearest male heir and his nearest male heir and so on in unending succession that the conditions are imposed. The last words of the sanad make this clear:—"As long as the obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the abovementioned estate." That must mean "maintain" the heirs who succeed according to the terms of the grant because no other heirs as heirs can take the estate. "Successors," therefore, is in their Lordships' opinion an inartistic phrase used for the purpose of expressing that, in the event of there being no alienation, those who succeed to the estate by virtue of the grant will succeed subject to the conditions and with the same provision as to succession as the person to whom the grant was originally made.

It is argued that this might enable the whole purpose of the grant to be defeated by any owner for the time being by gift, sale, or devise to the person, who on his death, would be the nearest male heir. This argument is open to the objection that until the moment of death occurs it is impossible to say who the nearest male heir will

be, so that the selection of the person might be almost impossible. But apart from that, their Lordships think that due effect can be given to the words of the sanad by construing it as meaning that "successors" includes the designated parties who would succeed in the event of intestacy, and that those designated parties cannot escape the obligations of the grant by having acquired the property through other means than succession.

Their Lordships are, therefore, unable to agree with the appellants' contention on the first point which this appeal raises, and in these circumstances the other questions do not arise for determination. They will, therefore, humbly advise His Majesty that these appeals should be dismissed. The 3rd, 4th, 5th and 6th respondents will have one set of costs only. There will be no other order as to costs.

*T. L. Wilson & Co.*—Solicitors for Appellants in 1st Appeal.

*E. Dalgado*.—Solicitor for Appellants in 2nd Appeal.

*Watkins and Hunter*.—Solicitors for Respondents 3 to 6.

A. P. P.

*Appeals dismissed.*

## APPELLATE CIVIL.

*Before Sir Nalini Ranjan Chatterjee, Knight, Judge, and  
Mr. Justice Panton.*

MESBAHUDDIN AHMED CHOWDHURY

v.

ABDUL BORKAT AHAMADULLA AND OTHERS\*

*Landlord and tenant—Land Registration Act (VIII. B. C. of 1876) Sec. 81—Bengal Tenancy Act (VIII of 1885), Sec. 16—Purchaser from a tenure-holder—Kabuliat, construction of—'On any ground.'*

The provisions of section 81 of the Land Registration Act are applicable to a case where one of the parties is a vendee of one of the contracting parties: *Iswar v. Kali* (1) not followed.

\* Appeal from Appellate Decree No. 373 of 1919, against the decree of S. E. Stinton Esq, 1st Additional District Judge of Dacca, dated the 27th November, 1918, affirming the decree of Babu Jatindra Prosad Chatterjee, Additional Subordinate Judge of Dacca, dated the 30th November, 1917.

(1) (1917) 27 C. L. J. 474.

P. C.

1921.

Ghulam Abbas

v.

Amatul Fatima.

Lord Buckmaster.

CIVIL.

1921.

May, 6.

CIVIL.

1921.

Mesbahuddin Ahmed

Abdul.

Section 16 of the Bengal Tenancy Act is a penal provision and should be strictly construed. It applies only to a person who claims the rent as a holder of the tenure, and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due: *William Sheriff v. Jogmaya Das* (1) followed.

A kabuliati contained the following: "You shall never be competent to enhance the said jama on any ground; nor shall we get abatement of the jama on the ground of diluvion or any other ground":

*Held*, that the words "on any other ground" referred to cases of like nature as diluvion: *Uma v. Tarini* (2) and *Watson & Co. v. Nistarini* (3) referred to.

A person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever. This principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself.

Appeal by the Defendant.

Suit for rent.

The material facts appear from the judgment.

*Dr. Saraf Chunder Basak and Babu Bhupendra Chandra Gupta* for the Appellant.

*Moulvi A. K. Faslul Huq and Babu Jahnabi Chandra Das Gupta* for the Respondents.

The judgment of the Court was as follows:

May, 6.

This appeal arises out of a suit for recovery of rent in respect of a putni.

The property originally belonged to one Salimannessa, and on her death was inherited by her mother Raisannessa Begum. The latter sold it to the plaintiff who brought the suit for rent on the basis of a kabuliati dated the 10th Assin 1312.

The Courts below have concurred in giving a decree to the plaintiff and the defendant has appealed to this Court.

Three contentions have been raised on behalf of the appellant. The first is that the plaintiff cannot recover rent, because Raisannessa did not get her name registered in the Collectorate in respect of the revenue paying property as required by section 78 of the Land Registration Act. But there was a written contract (Kabuliati) between Raisannessa and the defendant, and section 81 of the Land Registration Act lays down that nothing contained in section 78 shall be held to interfere with the conditions of any written contract.

(1) (1899) I. L. R. 27 Calc. 535.

(2) (1882) I. L. R. 9 Calc. 571.

(3) (1884) I. L. R. 10 Calc. 544.



CIVIL.

1921.

Mesbahuddin Ahmed

Abdul.

It is true that in one case *Iswar Chandra Bera v. Kali Charan Santra* (1), a restricted view was taken of the section, limiting it to the persons actually parties to the contract: but it has been held in some other cases that the provisions of the section are applicable to cases similar to the present (See S. A. No. 3276 of 1912 decided by Woodroffe and D. Chatterjee JJ. on the 20th May 1914 reported in 24 Indian cases 866; See also S. A. No. 1624 of 1919 decided on the 4th March 1921). We think therefore that this contention must fail.

The next contention is that Raisanessa not having applied under section 15 of the Bengal Tenancy Act, she was precluded by the terms of section 16 from suing to recover rent, and that the plaintiff therefore was also so precluded.

Now, section 16 refers to rent payable to a person as the holder of a tenure and in the case of *William Sheriff v. Jogmaya Dasi* (2), it was held by Banerjee and Stevens JJ. that section 16 of the Bengal Tenancy Act being a penal provision it should be strictly construed, and that it applies only to a person who claims the rent as a holder of the tenure, and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due, as in the present case. It is no doubt anomalous that although Raisanessa could not sue the defendant for rent, a transferee from her would be so entitled. As pointed however by Banerji, J.

"Perhaps that may appear somewhat anomalous, but the opposite view would result in a greater anomaly and indeed in hardship and injustice. For it may so happen that a son succeeding his father may not comply with the requirements of section 15 of the Bengal Tenancy Act immediately, but may expect to do so at any time within three years, that is before his claim for rent is barred, and then he may die suddenly; and then if section 16 is to apply to the claim of his heir or successor for rent which accrued due during his lifetime that claim would be irrecoverably lost, as his heir or successor could not possibly satisfy the requirements of section 15 so far as he was concerned." We think we may follow the said decision, and we accordingly hold that this contention must also fail.

The last contention is that there should be an apportionment of rent in respect of items Nos. 11 and 12 of the patta.

Now, the Kabuliati stated "You shall never be competent to enhance the said jama on any ground; nor shall we get abatement of the jama on the ground of diluvion or on any other ground"

(1) (1917) 27 C. L. J. 474.

(2) (1899) 1 L. R. 27 Cal. 535.

CIVIL.

1921.

Mesbahuddin Ahmed

v.

Abdul.

The learned Judge was of opinion that the words "on any other ground" contained a clear stipulation that the lessees shall not be entitled to have deduction of the rent on any account. It has been held however in some cases that these words would be taken as referring to cases of like nature as diluvion. (See the cases of *Uma Sunkur Sirkar v. Tarini Chunder Singh* (1); *Watson & Co., v. Nistarini Gupta* (2).

The principle no doubt is one in consonance with natural justice and equity that a person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever and this principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself.

But there are certain circumstances in the present case, which ought to be taken into consideration. The first is that the potta was executed as a settlement of family disputes, and secondly the 11th and 12th items in the schedule are described as Mahal Diara which indicates that they are temporary settled estates. The learned Subordinate Judge says "probably they got some advantages from other properties comprised in the patni, and so they did not think it worth their while to keep any provision for abatement of rent in case of Salima's not taking fresh settlement of the Dearth-mahal; had not that been the intention of the parties, patni lease of temporary settled estates would not have been taken, and the defendants would not have bound themselves to pay the entire jama for ever." But it does not appear what the relative income or advantages of the other properties, and items Nos. 11 and 12 are. The Court of appeal below has not gone into this matter fully nor has considered the circumstances which led to the inclusion of these properties in the lease without there being any provision that the lessor would take any re-settlement from Government.

In these circumstances, we think that the case should go back to the lower appellate Court in order that it may enquire into the matter, and consider all the surrounding circumstances and come to a decision whether it was intended that the rent should be paid even though the lessor did not apply to Government for renewal of the temporary settlement.

The first two questions we have already disposed of. The case is remanded only on the last point.

Costs to abide the result.

A. T. M.

Case remanded.

(1) (1882) 1. L. R. 9 Calc. 571.

(2) (1884) 1. L. R. 10 Calc. 544.

*Before Mr. Justice Newbould and Mr. Justice Suhrawardy.*

HAMIDA RAHAMAN AND ANOTHER

*v.*

JAMILA KHATUN AND ANOTHER.\*

CIVIL.

1921.

April, 18.

*Receiver—Civil Procedure Code (Act V of 1908), O. 40, R. 1, (2)—Finding as to allegations necessary—Receiver, if can enquire into claim of title—Court, if can delegate power of enquiry to receiver.*

The Court, on an objection being made by persons who are no parties to the suit, claiming the properties to be theirs and in their possession, is bound by clause (2) of rule 1 of order 40 of the Code of Civil Procedure, to come to a definite finding as to the truth of these allegations before it can make an order directing the receiver to take possession of the properties. Such allegations in the petition cannot be disposed of on the ground of a discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others when they applied to be added as parties to the suit.

It is not the duty of a receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the receiver.

Appeal by the Petitioners.

Suit for partition.

The material facts appear from the judgment.

*Dr. Sarat Chunder Basak and Babu Chandra Sekhar Sen* for the Appellants.

*Babus Joges Chunder Roy and Narendra Kumar Das* for the Respondents.

The judgment of the Court was as follows :—

This is an appeal against two orders by which the receiver who had been appointed in a suit was directed to take possession of certain properties movable and immovable. In the suit in question Jamila Khatun and others were the plaintiffs and Mokbul Ahmed and others were the defendants. The appellants before us are no parties to the suit ; but all the parties to the suit and the two appellants are descendants of one Haji Sadaddin Sadagar. The suit in question is a suit for partition of the properties left by Khalil Ahmed Sadagar the eldest son of Haji Sadaddin Sadagar. When the receiver was appointed in the suit and directed to take possession of the properties described in the plaint the present appellants filed

April, 18.

\* Appeal from Order No. 105 of 1920, against the orders of Babu Kumud Nath Roy, Subordinate Judge, First Court of Chittagong, dated the 17th and 23rd March, 1920.

CIVIL.

1921.

Hamida

Jamila Khatun.

a petition in which they alleged that certain properties described in schedule 1 of their petition belonged to them both, that certain immovable properties described in schedule 2 belonged to the petitioner No. 2 and that certain movable property described in the list which had been previously filed was in the possession of and was the property of both the petitioners. The learned Subordinate Judge who was trying the suit was of opinion that the allegation in this petition was not *bona fide* as regards the properties of schedule 2 of the application and the movable property. As regards the properties of schedule 1 he directed the receiver to make an enquiry as to the truth of the allegation and at the same time directed the receiver to take possession of all the properties except the properties of schedule 1. That is the first order appealed against being order No. 18 of the order-sheet dated 17th March, 1920. The second order appealed against is the order No. 25 passed on 23rd March, 1920. There the receiver was again ordered to take possession of the properties in suit other than that as to which he had been ordered to enquire and report; and he was further directed to take the help of the police and, if necessary, to break open any locks on doors of houses in which the properties of which he was to take possession were reasonably believed to be.

In our opinion, this appeal must be allowed. The lower Court, on an objection being made by persons who were no parties to the suit claiming the properties to be theirs and in their possession, was bound by clause (2) of rule 1 of order XL to come to a definite finding as to the truth of these allegations before it could make an order directing the receiver to take possession of the properties. We do not think that the allegations in the petitions can be disposed of on the ground of a discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others when they applied to be added as parties to the suit. As regards the movable property there was a distinct allegation of sale by auction by the National Bank and purchase by the petitioner. The petitioner should have been given an opportunity of proving the truth of this allegation. Similarly with regard to the properties of schedule 2 an enquiry should have been held into the allegation as to the purchase by the petitioner No. 2. As regards the properties of schedule 1 an enquiry has been ordered; but such an enquiry should have been held by the Court. It is not the duty of the receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the receiver. As an enquiry must be held

into the allegation as regards the properties of schedule 2 by the Court, so also must an enquiry as to the allegation with regard to the properties of schedule 1 be held by the Court. It is pointed out on behalf of the respondents that although in the petition it is stated that the movable properties claimed were set out in a list previously filed yet when the pleader moved the petition in the lower Court he was unable to find that list. It appears, however, that subsequently when the receiver tried to take possession there was no real doubt as to what properties were claimed by the petitioner appellants. If there be any difficulty on this point the appellants can be called on to furnish a list to take place of the one which could not be found when the applications were made.

The result is that the appeal is allowed. We set aside the orders of the lower Court dated the 17th of March 1920 and the 23rd of March 1920 directing the receiver to take possession of the properties claimed by the petitioners and we further direct that no such order be made in respect of any of the properties claimed until the claim of the petitioners has been duly investigated by the lower Court. The respondents must pay the appellants their costs in this appeal. We assess the hearing-fee at three gold mohurs.

*Rule No. 611 of 1920.*

The connected appeal having been decreed, no order is necessary on this Rule.

A. T. M.

*Appeal allowed.*

## CRIMINAL REVISION.

*Before Mr. Justice Teunon and Mr. Justice Suhrawardy.*

BHUBAN CHANDRA HAZRA

v.

NIBARAN CHANDRA SANTRA AND ANOTHER.\*

*Jurisdiction—Criminal Procedure Code (Act V of 1898), Sec. 145 (4)—Sufficient reason for decision.*

The trial Magistrate in his final order in a proceeding under section 145 of the Code of Criminal Procedure, should set out reasons for his decision suffi.

\*Criminal Revision No. 281 of 1921, against the order of P. C. Chatterjee Esq., Sub-Divisional Magistrate of Howrah, dated the 26th January, 1921.

CIVIL.

1921.

Hamida

Jamila Khatun.

CRIMINAL.

1921.

May, 18, 26.

## CRIMINAL.

1921.

Bhuban

Nibaran.

cient to enable the High Court to determine whether he has or has not complied with sub-section (4) of section 145. Without such statement it is impossible for the High Court to determine whether the Magistrate in making his final order has acted within or without his jurisdiction.

Application for Revision under section 435 of the Code of Criminal Procedure by the Second Party.

Proceeding under section 145 of the Code of Criminal Procedure.

The material facts appear from the judgment. The following order was passed by the lower Court :

"Five examined. Heard argument of learned pleaders on both sides. Considered the oral and documentary evidence of both parties on the light of arguments addressed by the learned pleaders. Held that the first party are in possession of the land in dispute and I declare under section 145 Cr. P. C. that the first party are entitled to retain possession of the same till evicted therefrom in due course of law. I forbid all disturbance of such possession till such eviction. Issue and publish order accordingly."

*Babu Atulya Charan Bose, Hari Charan Ganguli and Mono Mohan Bose* for the Petitioner.

*Babu Hiralal Chakrabarty* for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :

This Rule arises out of proceedings taken under the provisions of section 145 Cr. P. C. The Rule was issued because it appeared to the Court that in his final order the trial Magistrate did not sufficiently set out the reasons which had led him to his decision.

It is contended on behalf of the opposite party that sections 366 and 367 of the Code of Criminal Procedure do not in terms apply to proceedings under section 145, and in support of this contention reference has been made to the case *Kalu Mirza v. Emperor* (1) Whether the sections cited do or do not apply to proceedings under section 145 Cr. P. C. we have no doubt that we are entitled to require from the trial Magistrate a statement of the reasons for his decision sufficient to enable us to determine whether he has or has not complied with sub-section (4) of section 145 Cr. P. C. and directed his mind to the consideration of the effect of the evidence adduced before him. Without such statement of reasons it is impossible for us to determine whether the Magistrate in making his final order has acted within or without his jurisdiction. The statement of reasons in the present case which is merely to this effect,

(1) (1909) I. L. R. 37 Calc. 91.

May. 26.

that five witnesses had been examined, that the learned pleaders had been heard and that the oral and documentary evidence of both parties had been considered in the light of the arguments addressed to the Court, is of a stereotyped nature applicable to any and every case and obviously does not enable us to understand what in fact the evidence was or to say that the mind of the trying Magistrate had been properly and sufficiently directed to its consideration.

We therefore set aside the final order made by the Magistrate on the 26th January and direct that the case be reopened at the point reached on that date and that after hearing the parties afresh, and after recording a statement of the reasons for his decision such as we have already indicated, the learned Magistrate do dispose of the matter in accordance with law.

A. T. M.

*Rule made absolute.*

*Before Mr. Justice Teunon and Mr. Justice Sukrawardy.*

GOGAN HOWLADAR

v.

KARIMADDI CHAWKIDAR AND OTHERS.\* . .

*Criminal Procedure Code (Act V of 1898), Sec. 145—Final order based on no evidence, if valid.*

Where a final order under section 145 of the Code of Criminal Procedure was made by the trial Magistrate on the basis of a local enquiry of which there was no note or memorandum, and on the basis further of a judgment in a case under section 448 of the Indian Penal Code instituted on the complaint of a third person against some members of the second party :

*Held*, that the final order being based on no evidence, was bad and was set aside.

Application for Revision under section 435 of the Code of Criminal Procedure by the first Party.

Proceeding under section 145 of the Code of Criminal Procedure.

The material facts appear from the judgment.

\*Criminal Revision No. 302 of 1921 against the order of the Sub-Divisional Magistrate of Bagerhat, dated the 16th March, 1921.

CRIMINAL.

1921.

Bhuban

v.

Nibaran.

CRIMINAL.

1921.

May, 26.

CRIMINAL.

1921

Gogan

Karimaddi.

May, 26.

*Babu Hemendra Chandra Sen* (for *Babu Bhujanga Bhushan Mukhejee*) for the Petitioner.

*Babu Santosh Kumar Bose* for the Opposite Party.

The judgment of the Court was as follows :

In this case proceedings under section 145 of the Code of Criminal Procedure were initiated in respect of a tract of land measuring some 48 bighas. The final order has been made by the trial Magistrate on the basis of a local enquiry of which we have no note or memorandum, and on the basis further of a judgment in a case made under section 448 Indian Penal Code instituted on the complaint of one Sajoo Bibi the wife of Hasunuddi against Karimaddi Chaukidar and Dholai Howladar who appear to be members of the second party. The final order is thus it appears based upon no evidence and must therefore be set aside. The proceedings will now be reopened at the stage reached on the 10th February 1921, and the matter heard and disposed of in accordance with law.

The Sub-Divisional Magistrate who made the final order, we learn from the explanation submitted by the District Magistrate, has been transferred from the sub-division in question. There is nothing therefore to prevent the further trial now directed from taking place in the Court of the officer now holding the position of the Sub-Divisional Magistrate.

A. T. M.

*Rule made absolute.*



## APPELLATE CIVIL

*Before Mr. Justice Mitra and Mr. Justice Cusperas.*

PROMOTHA NATH RAY CHAUDHURI AND OTHERS

CIVIL.

1907.

February, 1, 5, 6,  
15.

DINAMANI CHAUDHURANI.\*

*Limitation—Limitation Act (XV of 1877), Sch II. Arts 140, 142, 144—Rights strictly not of remainder-man—Dispossession—Deed of doubtful import, construction of.*

A deed of doubtful import is best construed by evidence of the conduct of the parties to it.

A died leaving him surviving a widow B and after giving her an authority to adopt a son or three sons in succession. In pursuance of the authority to adopt, B adopted C, but when the latter had attained the age of majority, disputes arose between them as to the management of the estate left by A. B sought to keep the management and control to the exclusion of C. These disputes were settled by an ekrarnama executed on the 6th September, 1865, C married the plaintiff D and on his death, without male issue, in 1887, D, as his widow became his heiress. The ekrarnama gave B power to possess and enjoy the property for life. C thereby withdrew all claim to possession of the property covered by the instrument except as to certain villages specified in it. B was to perform all acts of possession, to sue and be sued as owner during her life and to appropriate to her own use the profits, conditionally on her paying household and marriage expenses &c. C reserved the right to enter into possession only after her death and thereby created in himself the right of a remainder-man. But B had not the power of alienation, even of her life estate, and any accretions and accumulations made during her life time were not to go to her heirs or heiresses of *stridhan* but to her son and his heirs.

B continued to be in possession in the same way as before A's death, till her death in 1900. D then took possession of the estate left by her father-in-law A and her husband C. During the lifetime of B, the defendants or their predecessors-in-title had taken possession of the disputed lands and their possession had lasted for more than 12 years before the institution of the present suit:

*Held*, that the ekrarnama merely intended to give the rights and impose the obligations of a Hindu widow, and to postpone the period of C's possession until B's death. The estate was not a life estate and C was not a remainder-man strictly so called. B's right to possession under the ekrarnama was also materially different from what right she had under the words in the power of adoption.

Article 140 Sch. II of the Limitation Act was applicable and the plaintiff's

\*Appeal from Appellate Decree No. 2609 of 1904 against the decree of Babu Aghore Chandra Hazra, Additional Subordinate Judge of Mymensingh, dated the 10th August, 1904, affirming that of Babu Devabrata Mukherjee, Munsiff, 3rd Court of Atia, dated the 31st March, 1903.

CIVIL.

1907.

Promotha

Dinamani.

suit was not time-barred. Articles 142 and 144 could not apply as the plaintiff (including any person or through whom the plaintiff derived her right to sue) was not dispossessed and the possession of the defendants did not become adverse to her until B's death.

Article 140, Sch. II of the Limitation Act, contemplates a suit by a remainderman or reversioner for possession of immovable property, when his estate falls into possession.

Appeal by the Defendants.

Suit for possession.

The material facts appear from the judgment.

*Dr. Rash Behary Ghosh, Babus Joges Chunder Roy and Mukund Nath Roy* for the Appellants.

*Mr. Hill, Babus Basant Coomar Bose, Dwarka Nath Chuckerbutty, Kritanta Coomar Bose and Umes Chandra Ghosh* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

February, 15.

**Mitra, J.**—The questions raised before us in these appeals relate to the plea of limitation.

Golucknath Ray was the owner of the lands in controversy. He died many years ago leaving him surviving a widow Jahn timer Chaudhurani and after giving her an authority to adopt a son or three sons in succession. In pursuance of the authority to adopt Jahn timer adopted Baikunt nath Ray, but when the latter had attained the age of majority, disputes arose between them as to the management of the estate left by Golucknath. Jahn timer sought to keep the management and control to the exclusion of Baikunt nath. These disputes, however, were settled by an ekrarnama executed on the 22nd Bhadra 1272 B. S. corresponding with 6th September, 1865. Baikunt nath married the plaintiff Dinamani Chaudhurani and on his death, without male issues in 1887, Dinamani, as his widow, became his heiress. Jahn timer however continued to be in possession in the same way as before Baikunt nath's death. She died in 1900, and then Dinamani took possession of the estate left by her father-in-law Golucknath and her husband Baikunt nath. During the life time of Jahn timer the defendants or their predecessors in title had taken possession of the disputed lands and their possession had lasted for more than twelve years before the institution of the suits under appeal.

If Jahn timer had an estate for life under the ekrarnama of 1865, and if Baikunt nath was the remainderman or reversioner, the

death of Jahnavi would be the starting point for calculating the period of limitation under Art. 140 of the second schedule of the Limitation Act. The lower Courts have construed the deed as giving Jahnavi an estate for life and have decided the question of limitation in favour of the plaintiff. The contention on behalf of the defendants is that the ekrarnamah did not create an estate for life, but that it merely empowered her to manage during her natural life that it was only an irrevocable power of attorney, the estate continuing to be vested in Baikantnath in the same way as before the execution of the deed. The further contention on their behalf is that even if the deed be not an irrevocable power of attorney, the estate created by it was not strictly a life estate, and Baikantnath was neither the remainder-man nor the reversioner, and his heiress is not entitled to the benefit of Art 140. The case admittedly does not come under Art. 141, as Jahnavi was not in possession as a Hindu widow or mother. The contention of the defendants, therefore, is that the plaintiff is barred either under Art. 142 or 144 of the second schedule.

The question of the construction of this deed is not *res integra*. In 1897 it was construed in this Court at the instance of some of the defendants who in a suit instituted by Jahnavi for possession of land, pleaded that she had no real right entitling her to sue for possession but that she was merely a manager under the deed. The Court held that the deed gave Jahnavi an estate for life. In two other appeals *Dinamani v. Elahudad* (1) and *Dinamani v. Elahudad* (2) in which the present plaintiff was appellant and one Elahudad Khan was the respondent, it was held that the deed gave Jahnavi an estate for life.

The conduct of the parties to the deed also tends to show that they thought that Jahnavi was not merely a manager, that she had an estate which entitled her to possession and enjoyment of the profits during her life time, and that Baikantnath was not entitled to re-enter until after her death. A deed of doubtful import is best construed by evidence of the conduct of the parties to it—*optimus interpres rerum usus*.

We have carefully examined the document both in the vernacular and the translation in English, and our conclusion is substantially the same as that arrived at by the learned Judges who had to deal with it. The Anumati-patra under which Jahnavi obtained her power to adopt a son gave her authority to manage or preserve her husband's estate but without prescribing any period or extent. It

(1) (1903) 7 C. W. N. 678. (2) (1904) 8 C. W. N. 843.

CIVIL.

1907.

Promotha

v.

Dinamani.

Mitra, J.

CIVIL.

1907.

Promo:ha

Dinamani.

Mitra, J.

created no estate in her. The ekrnamah however executed by her son, distinctly gave her the power to possess and enjoy the property for her life (*Bhoghan o dahhalikar*). The son thereby withdrew all claims to possession of the property covered by the instrument except as to certain villages specified in it. Jahnavi was to perform all acts of possession, to sue and be sued as owner during her life and to appropriate to her own use the profits, conditionally on her paying household and marriage expenses etc. The son reserved the right to enter into possession only after her death and thereby created in himself the right of a remainder-man. He could not exercise any acts of possession or sue for possession a wrongdoer against Jahnavi during the latter's life time. These are indicia of an estate for life strictly so-called.

But there are other expressions and conditions in the ekrnama which appear to be anomalous. Jahnavi had not the power of alienation, even of her life estate, and any accretions and accumulations made during her life time were not to go to her heirs or heiresses of stridhan but to her son and his heirs. It would seem that the deed was merely intended to give the rights and impose the obligations of a Hindu widow, and to postpone the period of the adopted son's possession until his mother's death. The estate was not a life estate and Baikantanath was not a remainder-man strictly so called; Jahnavi's right to possession under the ekrnamah was also materially different from what right she had under the words in the power of adoption.

It is, however, immaterial whether the deed conferred on Jahnavi a life estate properly so-called and whether Baikanta was a remainder-man or reversioner, taking after the lapse of a life estate in its strict sense. Art. 140 of the second schedule of the Limitation Act contemplates a suit by a remainder-man or reversioner, for possession of immovable property, when his estate falls into possession. Baikantanath, and on his death, during Jahnavi's life time, his widow Dinamani, were entitled to possession only after the determination of the limited or particular estate held by Jahnavi, whatever its precise nature may have been. The estate did not fall into possession until Jahnavi's death, and we see no bar to the application of Art. 140 to the facts of the case, and, if that article applies, the plaintiff's suit is not time-barred.

Articles 142 and 144 cannot apply as the plaintiff [which word, according to the interpretation clause (section 3) includes also any person from or through whom a plaintiff derives his right to sue]

was not dispossessed and the possession of the defendants did not become adverse to her until Jahnavi's death.

No other question has been argued before us, and the plea of limitation failing, the appeal must be dismissed with costs.

A. T. M.

*Appeal dismissed.*

CIVIL.

1907.

Promotha

v.

Dinamani.

Mitra, J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Buckland.*

JOGENDRA NATH SAHA CHAUDHURI AND OTHERS

v.

MAHARAJA JAGADINDRA NATH RAY CHAUDHURI  
OF NATORE.\*

CIVIL.

1921.

May, 19, 20, 23.  
July, 8.

*Landlord and tenant—Putni lease—Land, whether included in putni—Submergence—Entry in finally published record of rights—Incorrectness—Burden of proof—Bengal Tenancy Act (VIII of 1885), Sec. 103 B Sub-sec. (3)—Tenant's acquisition of title to limited interest by adverse possession—Possession, nature of.*

The burden of proof lies *prima facie* upon the plaintiff to establish the incorrectness of the entry made in the finally published record of rights which must be presumed to be correct until proved by evidence to be incorrect under sub-section (3) of section 103 B of the Bengal Tenancy Act. But for this circumstance, it could not be presumed that because the defendants hold a putni taluk under the plaintiff, a particular tract in dispute was comprised within the tenure: *Frota v. Sudisthir* (1) and other cases referred to. But where evidence had been adduced by each of the contestants in support of their respective cases and the relevant facts were before the Court, the question of burden of proof was immaterial and importance should not be attached to the question on whom the initial onus lay.

The land after submergence becomes derelict, and so long as it remains submerged, no title can be made against the true owner.

The possession must be adequate in continuity in publicity, and in extent of area to take the title out of the true owner: *Radhamoni v. Collector of Khulna* (2).

\* Appeal from Original Decree No. 66 of 1920, against the decree of Babu Pasupati Basu, Subordinate Judge of Pabna, dated the 29th February, 1920.

(1) (1914) 19 C. L. J. 408.

(2) (1900) L. R. 27 I. A. 136; I. L. R. 27 Calc. 943.

CIVIL.

1921.

Jogendra

Maharaja Jagadindra

The possession required must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation: *Jogendra v. Baladeo* (1). This is specially necessary in a case between landlord and tenant.

The tenant's possession of the lands encroached upon can commence to be adverse only where the title adverse to the landlord is asserted or the landlord becomes aware of the encroachment: *Iskan v. Ramnanjan* (2). This is essential to enable the tenant to acquire title to limited interest by adverse possession thereof.

Appeal by the Defendants.

Suit for recovery of possession with mesne profits, and for incidental reliefs.

The material facts are stated in the judgment of Mookerjee J.

*Dr. Dwarka Nath Mitter* and *Babu Manindra Nath Banerjee* for the Appellants.

*Babus Dwarka Nath Chuckerbutty, Rama Kanta Bhattacharyya, Jatindra Nath Lahiri, Krishna Kamal Maitra* and *Heramba Lal Sanval* for the Respondent.

C. A. V.

The judgments of the Court were as follows:

July, 8.

**Mookerjee, J.**—The subject matter of the litigation which has culminated in this appeal is a large tract of land known as Mauza Edalair Kandi otherwise called Khairaddi Kandi. The plaintiff respondent, the Maharaja of Natore, claims the disputed property as comprised in his zemindary which formerly bore Tauzi No. 42 of the Collectorate of Rajshahi and now bears Tauzi No. 2166 of the Collectorate of Pabna. In 1910 in the course of cadastral survey proceedings under the tenth chapter of the Bengal Tenancy Act, a dispute arose between the plaintiff and the defendants, who claimed that they were in possession of the land now in suit as comprised in a patni taluk known as Goalnagar Maldah held by them under the Maharaja of Natore. The objection taken by the defendants under section 103 A of the Bengal Tenancy Act was allowed by the Assistant Settlement Officer on the 5th September 1911. The record of rights drawn up on this basis was finally published on the 1st August, 1914. On the 14th April, 1919, the Maharaja of Natore instituted the present suit for establishment of his title, for declaration that the disputed village was not comprised in the patni taluk held under

(1) (1907) 1 L. R. 35 Calc. 961; 6 C. L. J. 735; 12 C. W. N. 127.

(2) (1905) 2 C. L. J. 125.

CIVIL.

1921:

Jogendra

Maharaja Jagadindra

Mookerjee, J.

him by the defendants, for recovery of possession with mesne profits, and for incidental reliefs. The defendants resisted the claim on the ground that the revenue authorities had correctly held that the disputed village was comprised in their patni, and that if it were found to lie beyond the ambit of the patni, the defendants had acquired a good title by adverse possession for the statutory period. The defendants further urged that the Subordinate Judge of Pabna had no jurisdiction to entertain the suit as the land was situated within the district of Faridpur. The Subordinate Judge overruled the contentions of the defendants and decreed the claim with costs. On the present appeal, the decision of the Subordinate Judge has been assailed on three grounds, namely; first, that the trial Court had no jurisdiction to entertain the suit; secondly, that the land is comprised in the patni taluk held by the defendants; and thirdly, that if the land be found to have been situated beyond the limits of the putni taluk, the defendants have acquired an indefeasible title by adverse possession for the statutory period.

The first ground is plainly unsubstantial. Section 13 (1) of the Bengal Civil Courts Act, 1887, lays down that the local Government may, by notification in the official Gazette, fix and alter the local limits of the jurisdiction of any civil Court under the Act. The jurisdiction list dated the 3rd June, 1903, shows that the District of Pabna, where the Subordinate Judge exercises jurisdiction, comprises all the mauzas (inclusive of the mauza in suit) demarcated and surveyed in the survey of 1850-55. Consequently, no weight can be attached to the contention of the defendants that the river Padma is the boundary between the two districts, and that the river has so shifted in recent years as to transfer the disputed land from the jurisdiction of the Pabna Court to the jurisdiction of the Faridpur Court. But even if it were conceded that the shifting river should be accepted as the boundary for the purpose of determining the jurisdiction of a Court under the Bengal Civil Courts Act, 1887, the objection taken by the defendants is futile. Their contention is that the old main stream of the river to the south has become a shallow small stream and an old shallow stream to the north has become the new main stream. The evidence adduced in support of this allegation is not satisfactory, and certainly not conclusive. As no map was prepared for this purpose, it is impossible for us to say which is the main channel and which is the subsidiary channel of the river. Besides, as was pointed out by this

Civil,  
1921.  
Jogendra  
v.  
Maharaja Jagadindra  
Mookenjee, J.

Court in the case of *Midnapore Zemindary Co. v. Kumar Nares, Narain* (1) where a similar objection was unsuccessfully urged, the contention of the defendants cannot possibly prevail in view of the provisions of sections 18 and 21 of the Civil Procedure Code; even if it be assumed that it is doubtful whether the property lay within the jurisdiction of the Pabna Court or the Faridpur Court, the decree of the Subordinate Judge cannot be set aside, as it has not been suggested, much less established, that there has been a failure of justice. The first contention must consequently be overruled.

The second ground raises the question, whether the disputed village which is admittedly known as Edalair Kandi or Khairaddi Kandi is comprised in the patni taluk Goalnagar Maldah which is held by the defendants under the Maharaja of Natore. The burden of proof lies *prima facie* upon the plaintiff to establish the incorrectness of the entry made in the finally published record of rights which must be presumed to be correct until proved by evidence to be incorrect under sub-section (3) of section 103 (B) of the Bengal Tenancy Act. But for this circumstance, it could not be presumed that because the defendants hold a patni taluk under the plaintiff, a particular tract in dispute is comprised within the tenure: *Protab Chandra v. Judisthir* (2) *Sheodeni v. Chatoorbhuj* (3); *Gopini v. Lokenath* (4). But where, as in the present case, evidence has been adduced by each of the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay; see the observations of Viscount Haldane in *Kunāal Lal v. Begum* (5) and of Sir Lawrence Jenkins in *Seturathnam v. Venkatachala* (6). When we approach the evidence from this standpoint, what is the position? Two facts are undisputed, namely, first, that the disputed tract is situated within the zemindary of the plaintiff, and secondly, that the defendants hold under the plaintiff a patni taluk known as Goalnagar Maldah. The dispute is whether the village in controversy which is known as Edalair Kandi or Khairaddi Kandi is comprised within the patni taluk Goalnagar Maldah. The plaintiff asserts that the answer should be in the negative. The defendants contend

(1) (1921) 33 C. L. J. 497.

(2) (1914) 19 C. L. J. 408.

(3) (1894) 12 C. L. J. 376.

(4) (1911) 19 C. L. J. 414 Note.

(5) (1918) 22 C. W. N. 937.

(6) (1919) L. R. 47 I. A. 76; I. L. R. 43 Mad. 567.



that Goalnagar Maldah includes Edalair Kandi or Khairaddi Kandi and also Maldah. The Subordinate Judge has found that the case for the defendants has been completely negatived by the evidence adduced on behalf of the plaintiff. The maps exhibited in the trial Court, namely, the survey maps made in 1854 of Edalair Kandi, Khairaddi Kandi, Maldah, Dhalah and Dhurai as also the Dearah survey map made in 1869 show conclusively that Edalair Kandi or Khairaddi Kandi is a distinct mauza from Maldah. This is also borne out by the Mauzawar register and the Mahalwar register of Pergana Chapila and the general register of revenue paying lands. It is further corroborated by a large body of oral evidence on the record, and for our present purpose it is sufficient to refer specially to the statement of Rajmohan Das, one of the witnesses examined by the defendants, who asserted in examination-in-chief that Khairaddi Kandi before diluvion was high enough to be beyond the reach of water even during the rains, and that to its north lay the Mauza Atravi and to its south lay the mauza Goalnagar Maldah. There could be no doubt as to the meaning of the statement made by the witness, because he added that there were pillars to demarcate the boundary between Khairaddi Kandi and Goalnagar Maldah. There can, in our opinion, be no room for doubt that the Subordinate Judge has correctly held that Goalnagar Maldah is merely another name for Maldah and that Edalair Kandi or Khairaddi Kandi is a quite distinct village. It is not disputed that one Bhairabchandra Majumdar was the holder of the patni under the Maharaja of Natore and that it ultimately passed into the hands of Fakrudin Ahammad alias Azimuddin Chaudhuri. The patni taluk was sold for arrears of rent, and on the 5th December, 1881, the defendants became purchasers at the execution sale in the name of their officer Benimadhab Chaki. The patni taluk which was thus brought to sale was expressly stated in the sale certificate as situated in Goalnagar Maldah. *Prima facie*, then, the defendants are entitled to possession of lands comprised in Goalnagar Maldah, and they must consequently prove that the disputed land which is known as Edalair Kandi or Khairaddi Kandi is part and parcel of Goalnagar Maldah. This they have signally failed to establish. Reliance has been placed by the defendants on the plaint dated 13th June, 1882, the decree of the trial Court dated 17th January, 1883, and the decree of the appellate Court dated 21st September, 1883 in a suit instituted by the official trustee of Bengal

CIVIL.

1921.

Jogendra

v.

Maharaja Jagadindra

Mookerjee, J.

Civil.  
 1921.  
 Jogendra  
 v.  
 Maharaja Jagadindra  
 Mookerjee, &c.

as trustee to the estate of one Pogose of Calcutta against some persons for recovery of possession of twelve bighas of land. In the plaint it was stated that the lands then in dispute were situated in "Goalnagar Maldah commonly called Khairaddi Kandi." The title of Pogose is however traced to an execution sale held on the 19th November, 1879 for the realisation of a rent decree obtained by Pogose against Fakruddin Ahammad *alias* Azimuddin Chaudhuri. The subject-matter of that sale was land and buildings of what was known as the Maldah factory, described as situate in mauza Khairaddi Kandi. This clearly does not establish that Khairaddi Kandi was in fact identical with Goalnagar Maldah; indeed, it may be a matter for controversy whether, notwithstanding the comprehensive terms of section 13 of the Indian Evidence Act as explained in the decision of the Judicial Committee in *Dinomoni v. Brojo Mohini* (1), the litigation between Pogose and his adversaries could be treated as an instance in which the right now in dispute was claimed, recognised or exercised. Apart from this, we have the fact that notwithstanding the sale of the factory on the 19th November, 1879, the putni was sold at the instance of the Maharaja of Natore nearly two years later on the 5th December, 1881. We agree with the Subordinate Judge that this tends to show that Azimuddin Chaudhuri held the factory and the patni taluk in two distinct rights; the first passed to the official trustee as trustee to the estate of Pogose; the second ultimately passed to the present defendants. This is also confirmed by the circumstance that the objection urged to the claim of the official trustee that his title had been superseded by that of the auction-purchaser of the patni taluk was not upheld. The case for the defendants is not further advanced by the recitals (assuming them to be admissible in evidence) contained in the darpatni lease granted by one of them to Prosonno Kumar Ganguli on the 12th September, 1882, and, the decree dated 6th November, 1903 in a partition suit amongst members of their family; these recitals do not contain even an assertion of right or claim with regard to the property now in suit, but only an allegation that a tract of land is known by one of three alleged names "mauza Goalnagar Maldah *alias* Edalair Kandi commonly called Khairaddi Kandi." There is, in our opinion, no escape from the conclusion that the Subordinate Judge has correctly held that the lands of Edalair Kandi or Khairaddi Kandi are wholly outside the lands of the patni taluk Goalnagar Maldah or Maldah held by the defend-

(1) (1901) L. R. 29 I. A. 24; I. L. R. 29 Cal. 187.

ants under the Maharaja of Natore. The second ground consequently fails.

The third ground raises the question, whether the defendants have acquired indefeasible title to the disputed land by adverse possession for the statutory period. The hypothesis that they have acquired such title is found hedged all round by inextricable difficulties, when we bear in mind a fundamental fact, which is admitted by both the parties, namely, that the disputed site has been subject to the destructive action of the river Padma. The case for the plaintiff is that the diluvion commenced shortly after the revenue survey operations of 1854 and that the land was reformed towards the end of 1907 or the early part of 1908. The case for the defendants is that the diluvion began only so late as 1896, and that the land was reformed in 1904. The determination of the question, when the diluvion commenced and when the reformation took place, depends upon the appreciation of conflicting oral evidence. The Subordinate Judge has, upon a careful analysis of that evidence held that the dates indicated by the respective parties cannot be accepted as absolutely correct. He has found that the testimony of the witnesses points to the conclusion that the diluvion commenced about the year 1890 and that the reformation took place during the early months of 1908. The evidence has been placed before us, and we see no reason to differ from the view adopted by the Subordinate Judge. The question of acquisition of title by adverse possession must consequently be investigated on this basis. In this connection, it is important to bear in mind the decision of the Judicial Committee in *Secretary of State for India v. Krishnamoni Gupta* (1), which overruled the case of *Kally Churn Sahoo v. Secretary of State for India*, (2), decided by a Full Bench of this Court in 1881. Lord Davey relied upon the earlier decision of the Judicial Committee in *Agency Co. v. Short* (3) in support of the proposition, that on the dispossession of a trespasser by the *vis major* of the floods, the constructive possession of the land is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. If we apply this elementary principle to the circumstances of the present case, it follows that the defendants, in order that they may succeed on the strength of title by adverse possession, must prove, either

CIVIL.

1921.

Jogendra

Maharaja Jagadindra

Mookerjee, J.

(1) (1502) L. R. 29 I. A. 104; I. L. R 29 Calc. 318.

(2) (1881) I. L. R. 6 Calc. 725. (3) (1888) 13 App. Cas. 793.

CIVIL.

1921.

Jogendra

Maharaja Jagadindra

Mookerjee, J.

that they had by adverse possession acquired such title since the date of reformation and before the commencement of this litigation; or, that they had acquired such title to the extinction of the title of the true owner before the date of the diluvion. As regards the first alternative, the defendants cannot possibly succeed, because at the date of the institution of the suit on the 14th April, 1919, only eleven years had elapsed from the date of the reformation. As regards the second alternative, the defendants are in a similar jeopardy. The best attested instances of alleged possession do not extend beyond the 3rd February, 1881; consequently not more than nine years had elapsed when the diluvion took place in 1890. There is thus no escape from the conclusion that even if we assume that the defendants were in actual occupation, their possession did not extend over the statutory period of twelve years either before the diluvion or after the reformation. In addition to this, it is equally clear that the possession they allege does not satisfy the test formulated by Lord Robertson in *Radhamoni Debi v. Collector of Khulna* (1), namely, that the possession must be adequate in continuity, in publicity and in extent of area to take the title out of the true owner. Reference may also be made to the decision in *Jogendra Nath Rai v. Baladeo Das* (2), which is an authority for the proposition that the possession required must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation. See also *Amrita Sundari v. Serajuddin* (3). This is specially necessary in a case between landlord and tenant, because as explained in *Ishan Chandra v. Ramranjan* (4), the tenant's possession of the lands encroached upon can commence to be adverse only when the title adverse to the landlord is asserted or the landlord becomes aware of the encroachment; this is essential to enable the tenant to acquire title to a limited interest by adverse possession thereof, see also *Gopal v. Lakshiram* (5); *Sarada v. Akhil* (6); *Muthu v. Orr* (7). The defendants thus find themselves in a situation of much embarrassment from the points of view indicated, and it is superfluous to investigate in detail how far the evidence of alleged possession is trustworthy,

(1) (1900) L. R. 27 I. A. 136; I. L. R. 27 Calc. 943.

(2) (1907) I. L. R. 35 Calc. 961; 6 C. L. J. 735; 12 C. W. N. 127.

(3) (1914) 19 C. W. N. 565.

(4) (1905) 2 C. L. J. 125.

(5) (1912) 16 C. W. N. 634.

(6) (1917) 28 C. L. J. 18; 21 C. W. N. 903.

(7) (1910-11) I. L. R. 35 Mad. 618.

but we may add that no solid arguments have been advanced to shake the conclusion of the Subordinate Judge that that evidence is on the whole unreliable. There is little doubt that so far back as in 1881, steps were taken by them to fabricate evidence of possession by the acceptance of collusive kabuliats which either related to fictitious tenancies or to lands situated beyond the limits of Khairaddi Kandi alias Edalair Kandi, but designedly misdescribed as comprised within the ambit of its boundaries. We agree with the Subordinate Judge that the defendants have signally failed to establish their alleged adverse possession of the disputed lands so as to extinguish the title of the true owner.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

**Buckland, J.**—I agree.

A. T. M.

*Appeal dismissed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Buckland.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

MOULVI WAZED ALI KHAN PANI AND OTHERS.\*

*Possession, suit for—Thak and survey maps—Lands included in Permanent Settlement—Burden of proof—Quinquennial papers, evidentiary value of—Hand sketches—Boundaries including area greater than referred to in return—Land after submergence, right to—Adverse possession—Possession, nature of—Submergence of reformed land—Re-flooding seasonal—Revenue sale, what is sold—Limitation Act (IX of 1908), Sch. I. Arts, 140, 142, 144—Estate falling into possession—Adverse possession against limited estate holder.*

It cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement. The question, what lands were included in the Permanent Settlement, is a question

\* Appeals from Original Decrees Nos. 328 and 197 of 1918, and 197 of 1919, against the decree of Babu Nogendra Nath Chatterjee, Subordinate Judge of Pabna dated the 8th July, 1918.

CIVIL.

1921.

Jogendra

Maharaja Jagadindra

Mookerjee, J.

CIVIL.

1921.

May, 9, 10, 11, 12, 16.

July, 22.

## CIVIL.

1921.

Secretary of State  
for India in Council.v.  
Wazed Ali.

of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps: *Jagadindra v. Secretary of State* (1) and *Ananda Hari v. Secretary of State* (2).

The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is on those who affirm that such was the case and the burden of proof is not necessarily shifted by the production of the *thak* and survey maps showing that specific lands are included in a particular estate. The *thak* and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement.

Quinquennial papers prepared by the revenue authorities from 1795 to 1799 under the provisions of Regulation XLVIII of 1793, are admissible in evidence: *Shoshi Bhooshun v. Giris Chunder* (3).

Reliance can be placed upon hand sketches drawn up by the parties on the basis of the information derivable from the quinquennial papers and the Hakikat Chauhaddi papers: *Haradas v Secretary of State* (4).

If, in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate: *Haradas v. Secretary of State* (4).

The land after submergence becomes derelict, and so long as it remains submerged, no title can be made against the true owner: *Secretary of State v. Krishnamoni* (5).

The nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner, is that the possession must be adequate in continuity, in publicity, and in extent of area: *Radhamoni v. Collector of Khulna* (6).

No rational distinction can be drawn between cases where reformed land is after a few years again submerged by the flood for a time, and cases where the re-flooding is seasonal and occurs for several months in each year: *Basanta v. Secretary of State* (7).

In a sale held under Revenue Sale Law (Act XI of 1859) what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment, but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale: *Surja Kanta v. Sarat* (8).

Under a deed of agreement, the mother-in-law of the plaintiff was to enjoy the properties of her adopted son for life; she was also to enjoy for life such immovable properties as she might acquire out of the profits of the properties of her

(1) (1902) 1. L. R. 30 Calc. 291; 1. R. 30 I. A. 44.

(2) (1905-6) 3 C. L. J. 316.

(3) (1893) 1. L. R. 20 Calc. 940. (4) (1917) 26 C. L. J. 590.

(5) (1902) 1. R. 29 I. A. 104; 1. L. R. 29 Calc. 518.

(6) (1900) 1. R. 27 I. A. 136; 1. L. R. 27 Calc. 943.

(7) (1917) 1. R. 44 I. A. 104; 1. L. R. 44 Calc. 858; 25 C. L. J. 487.

(8) (1914) 20 C. L. J. 653.

adopted son in her possession, and the mother-in-law of the plaintiff purchased certain properties out of such profits. The husband of the plaintiff died on the 27th April, 1887, and her mother-in-law died on the 26th February, 1900. The present suit for possession was instituted on the 29th March, 1910.

*Held*, that the plaintiff became entitled to possession only after determination of the limited or particular estate held by her mother-in-law and that estate did not fall into possession until her death, which took place within 12 years before the suit. To such a suit article 140, schedule I and not articles 142, and 144 of the Limitation Act were applicable.

Article 142, schedule I of the Limitation Act could not apply as the plaintiff was never in fact dispossessed; nor could article 144 apply, as possession of a trespasser could not be deemed adverse against a person not entitled to be in possession at that time.

Appeal by the Defendant.

Suit to recover possession with mesne profits.

The material facts appear from the judgment of Mookerjee J.

*Babus Ram Charan Mitra* and *Surendra Nath Guha* for the Appellant.

*Dr. Dwarka Nath Mitter* and *Babu Manindra Lal Banerjee* for the Respondents.

C. A. V.

The judgments of the Court were as follows:

**Mookerjee J.**—The subject matter of the litigations which have led up to the present appeals is an extensive tract of alluvial land and covers an area of about six thousand bighas. The plaintiffs in the two suits commenced below claim title to different shares in this tract of land. It is not necessary for our present purpose to set out in detail the shares claimed by these persons respectively; it is sufficient to state that the plaintiffs taken together as a body claim to be entitled to the disputed lands as reformation *in situ* of the permanently settled estates Nos. 26, 31 and 774-461 of the Mymensing Collectorate. The two last named estates have been transferred to the district of Pabna and bear Nos. 343 and 907 on the Revenue Rolls of the Collectorate of that district. These three estates comprised lands in the two districts, and the subject matters of the two suits are situated in the Pabna district. The case for the plaintiffs in both the suits is that these three estates which are permanently settled include the disputed lands as comprised within the mouzas and Paras (villages and their hamlets) mentioned in the plaint, namely, mouza Argyola including its para Meheranagar, mouzas Purbapara, Raneepur, Habbaspur, Dighalia, Idil Jangalia, Javariapara, mouza Gajanshar known as Laskarpur including its

CIVIL.

1921.

Secretary of State  
for India in Council.

Wazed Ali.

July, 22

CIVIL.

1921.

Secretary of State  
for India in Council.

Wajed Ali.

Mookerjee, J.

para Sonekalsi, Kismat Kathenga, Kismat Matiahati, mouza-Kowapara or Kowabari, mouza Kole, mouza Noada or Gopalbari including its para Majitbari. The plaintiffs assert that their predecessors-in-interest were in possession of these mouzas from the time of the permanent settlement; that while they were in possession, some of the mouzas were wholly and others were partly washed away by the strong current of the river Jamuna (a section of the river Brahmaputra) before the Tnak and Revenue Surveys, that accordingly they could not be surveyed by the revenue authorities at the time except in so far as there were dry lands not submerged in the river, that the lands subsequently reformed from time to time, and that when the lands emerged from the river and became fit for occupation, possession was wrongfully taken on behalf of the Secretary of State. On these allegations the plaintiffs seek to recover possession with mesne profits. The claim was contested by the Secretary of State on the allegation that the suits were barred by limitation and that the disputed lands did not form part of the mouzas mentioned in the plaints as comprised in the three permanently settled estates Nos. 26, 333 and 907. It was further asserted that in 1891, an island chur (subsequently named Chur Bell) was discovered in the bed of the Jamuna or Brahmaputra which is a public navigable river so that its bed was not the property of any individual, but belonged to Government; the disputed lands in reality formed part of this chur and of the accretions thereto. On these pleadings, eight issues were framed in the following terms and were set down for trial:

- (1) Is the suit barred by special limitation?
- (2) Is the suit barred by general limitation?
- (3) Have the plaintiffs acquired a right by adverse possession of the disputed lands for over sixty years?
- (4) Do the disputed lands appertain to the several mouzas claimed by the plaintiffs and are those lands permanently settled with them and have the plaintiffs any right to the mouzas and their paras, as mentioned in the plaints?
- (5) Is the allegation of diluvion and alluvion as given in the plaint correct?
- (6) Is the description of the disputed lands and mouzas as given in the plaint correct?
- (7) Is Mehernagar a para of Argyola? Does mouza Sonekalsi belong to the plaintiffs? Does Majidbari belong to the plain-



Civil.

1921.

Secretary of State  
for India in Council

Ward A i.

Mookerjee, 7.

tiffs and is it a para of Gohalbari? Is para. Matiahatte the same as mouza Matiahatte and does Matiahatte belong to the plaintiffs? Is Gajansahar another name of Laskarpur with para. Sonekalsi? Is the disputed land part of Gajansahar or Sonekalsi?

(8) Is the plaintiff entitled to get any wasilat? If so, how much? The Subordinate Judge appointed a commissioner for local investigation, who submitted with his report a case map after ralying the revenue survey maps of the several mouzas, the Dearah survey map, the settlement map of Chur Bell and of Chur Sahapur. The commissioner came to the conclusion that Chur Bell of 1901 falls within the disputed lands and occupies the site of what was the entire bed of the river Jamuna at the time of the Revenue Survey with small encroachments on the Revenue Survey mouzas Dighulia, Idil Jangalia and Tookra Gohalbari No. 2 on the east bank, on mouza Matiahatte on the south, and on survey mouzas Khidder, Kathenga, Kole, Habbaspur, Raneepur, Laskarpur and Purbapara on the west. No exception was taken to the accuracy of the map and report submitted by the commissioner and the Subordinate Judge consequently accepted them as correct. On their basis, taken along with the voluminous evidence on the record, the Subordinate Judge held that the lands in suit were comprised within mouzas Purbapara, Argyola, Mehernagar, Gajansahar, or Laskarpur with para. Sonekalsi, Raneepur, Habbaspur, Kole, Jangalia Kathenga with Matiahati, Gohalbari and Majitbari, Asabpur or Asurpara and Chuk Jangalia and Chuk Gohalbari and Dighalia. The Subordinate Judge also found that mouza Argyola including its para Mehernagar, mouza Purbapara, mouza Gajansahar or Laskarpur with its para Sonekalsi, mouzas Raneepur, Habbaspur, Dighulia, and Idil Jangalia appertain entirely to estate No. 25, that eight annas of mouza Kathenga including its para Matiahati, the twelve annas of mouza Kowabari and the eight annas of Javariapara are also comprised in estate No. 26 and that the remaining eight annas of Kismat Kathenga including its para now mouza Mattiahatte, the entire mouza Kole and Noadah known as Gohalbari are comprised in estate No. 343 and the remaining four annas of Kowabari to estate No. 907. The Subordinate Judge also held that the plaintiffs had failed to establish their alleged right to Majitbari and to prove that it is a para of Gohalbari. Upon the question of limitation, the Subordinate Judge found in favour of the plaintiffs except as to a small portion. On these findings, the Subordinate Judge decreed the suits in part. On the present appeals, the decrees of the Subordinate Judge have been challenged substantially on two

CIVIL.

1921.

Secretary of State  
for India in Council.

Wazed Ali.

Mookerjee, J.

grounds, namely, first, that the plaintiffs have failed to establish their title to the disputed lands as appertaining to Argyola, Meherdanga, Laskarpur, Kathenga and Gohalbari, and, secondly, that the claim is barred by limitation.

As regards the question of title, the case for the Secretary of State was that the plaintiffs must be restricted to the land shown as included within their permanently settled estates in the thak and revenue survey maps. This position is clearly untenable. As was pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath v. Secretary of State* (1), and by this Court in *Ananda Hari v. Secretary of State* (2), it cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the permanent settlement. The question, what lands were included in the permanent settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were included in the permanent settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the thak and survey maps showing that specific lands are included in a particular estate. The thak and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the permanent settlement. In the case before us, it appears that at the time of the revenue survey maps, Beel Kamlai and Argyola, Goyla Debu in the north lay wholly or mostly under water, but that the limits of these mouzas were shown in the revenue survey map; it further appears that Argyola Goyla Debu lay to the east of Beel Kamlai and that to the east of Argyola Goyla Debu lay on the east bank the mouza Meererpara, and to its east, mouza Argyola of Isafsahi, and on the west of Beel Kamlai lay the village of Hatboyra on the west bank, and that between Hatboyra on the west and Meererpara on the east, flowed the main channel of the river Jamuna, and that as the river ran from there southwards, it had on its east bank, mouza Dighulia, to the south of Meererpara, mouzah Edil Jangalia and Tookra Gohalbari No. 2, both lying to the south, one after the other, of Dighulia; on the west bank of the river opposite the mouza Meererpara from the north to mouza Tookra Gohalbari No. 2 to the south lay then the mouzas Purbapara, Laskarpur, Raneepur, Habbaspur, Kathenga and

(1) (1902) I. L. R. 30 Cal. 291; L. R. 30 I. A. 44.

(2) (1905-6) 3 C. L. J. 316.

CIVIL.

1921.

Secretary of State  
for India in Council.

Wazed Ali.

Mookerjee, J.

Khidder, from north to south, while between Kathenga and Khidder on the one side and Tookra Gohalbari No. 2 on the other bank, lay a portion of mouza Matiahatte, while the other portion of the last named mouza was situate south of Tookra Gohalbari No. 2 up to Koriapukur to the east; Matiahatte though shewn in the Mahalwar map of 1857, as within certain limits, seems to have been partly under water at the time of the revenue survey. The case map further shews that the river Jamuna flowed between the mouzas on the east and those on its west bank there and that Matiahatte was the southern most mouza; that to the east of Edil Jangalia lay the surveyed mouza Javariapara or Jarariapara; to its east lay mouzas Tookra Gohalbari No. 1 and Chuck Jangalia, one after the other, and that to the east of Chuck Jangalia as well as of mouza Dighulia lay mouza Soloso Jangalia; mouza Kowapara or Kowabari was also surveyed at the revenue survey and lay east of Javariapara and Tookra Gohalbari No. 2 and to the south of Tookra Gohalbari No. 1 Chuck Jangalia and Soloso Jangalia; mouza Rajnagar lay, according to the revenue survey, east of Dighulia and to the north or north east of Soloso Jangalia. The plaintiffs assert that portions of Argyola with its para Mehernagar, portions of Gajansahar Laskarpur with its para Sonekalsi and portions of mouza Kathenga with its para Matiahatte and of mouza Gohalbari with its para Majidbari and the entire mouza Jangalia were in the bed of the river Jamuna, at the time of the revenue survey, but were not measured or shewn there, and the plaintiffs would place the abovenamed mouzas in the bed of the river between the two banks, and they pointed out to the commissioner, the bed of the river as at that time as the sites of these mouzas. Such then was the position of the river Jamuna—a deep and navigable public river—at the time of the thak and revenue surveys. The question arises, whether the lands in dispute which at the time of the thak and revenue surveys were in the bed of this public navigable river formed part of the river bed at the time of the permanent settlement. If they were, it is improbable in the highest degree that they should have been settled with a private individual as included in his permanently settled estate. To elucidate the antecedent history of this tract of land, five sets of documents have been produced. The first of these documents is a plan referred to throughout as Rennel's map. This was made by Major Rennel as part of a survey which was conducted by him between the years 1764 and 1773. The map now under consideration is stated to have been prepared about the year 1787. The map itself does not purport to give the

## CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Waged Ali.

Mookerjee, J.

boundaries of different mouzas nor indeed to define their position with any exactness. It appears that the map was prepared rather for the purpose of showing the roads and the waterways than of locating villages, and consequently the description and definition of the different places is only necessary in relation to the rivers and the roads. The second class of documents consists of quinquennial papers prepared by the Revenue authorities from 1795 to 1799 under the provisions of regulation XLVIII of 1793. These contain information as to the lands comprised in revenue paying estates in the district of Mymensingh and were clearly admissible in evidence on the authority of the decision in *Shoshi Bhooshun v. Giris Chunder* (1). The third set of papers is described as Hakikat Chauhaddi Bundi papers which, as pointed out by the Judicial Committee in *Haradas v. Secretary of State* (2), are boundary papers prepared by the owners of the estates and submitted to Government. The precise purpose for which they were prepared in 1821 cannot be ascertained beyond doubt at this distance of time, but this is clear that they were not voluntary. They were made, under Regulation 1 of 1819 read with Regulation V. of 1816, section 7, clauses 5 and 8, on a Government form in pursuance of a Government request and to afford the Government satisfactory information upon the various questions to which they furnish answers inclusive of the names of proprietors, the names and boundaries of mouzas, the local boundaries of pergunas, the number and names of villages and estates, the articles of produce, the rates of rent, the rules and customs established in each perguna and all like local information; the duty to report to the Collector the death of every sadar malguzar and the names of their heirs clearly implies an authority if not obligation to keep a record of the names of proprietors in possession. The fourth document is a map prepared in 1831 by Lt. Wilcox. The fifth document is a map prepared for settlement purposes by one Sambhu Charan Singh in 1845, six years before the revenue survey map of 1851. If now we recall the fact that the decennial settlement made in 1788 was transformed into the permanent settlement in 1793, it is manifest that we have materials for a fairly continuous history of the disputed locality for a period of seventy years from 1781 to 1851. The general features of the locality may be visualised with fair approach to accuracy by the help of the two imaginary sketches or hand sketches which have been drawn up by the parties on the basis of the information derivable from the quinquennial papers and the Hakikat Chauhaddi papers.

(1) (1893) 1 L. R. 23 Calc. 940.

(2) (1917) 25 C. L. J. 590.

In view of the decision of the Judicial Committee in *Haradas v. Secretary of State* (1) which reversed the decision of this Court in *Secretary of State v. Kalika Prosad* (2), there can now be no question as to the propriety of placing reliance upon such hand-sketches. The boundaries indicated in the two classes of revenue papers do help the Court to form an idea of the relative situation of the mouzas and to fix the location of their external boundary, taking them in the aggregate. The circumstance that the mouzas do not form an absolutely compact block does not necessarily vitiate the method of investigation which met with the approval of the Judicial Committee in *Haradas v. Secretary of State* (1). In the case before us, the mouzas are sufficiently proximate to justify the application of that method, and we are of opinion that the handsketch prepared on behalf of the plaintiffs approximates more closely to the actual relative situation of the Mouzahs than the handsketch prepared on behalf of the defendant. After examination of Rennel's map, Wilcox's map and Sambhucharan Singh's map with the help of the handsketches prepared on the basis of the information derivable from the quinquennial papers and Hakikat Chauhaddi papers, we have arrived at the conclusion that the inference drawn by the Subordinate Judge is correct. According to Rennel's map, the river Brahmaputra used to flow in its main channel, through what is now known as the district of Mymensingh, and one of its branches—a much smaller stream than the main channel—flowed through the tract, which became subsequently known as the districts of Bogra and Pabna; this branch bore in its upper course, the name of Jenai and in the lower or southern portion, the name of Jamuna; another river used at that time to pass through the two districts of Bogra and Pabna, and it had three names in its three different parts; at the extreme north, it was known as the Bangala river, in the middle, as the Ichamati, and in its lower part, the Konai; the Jamuna or the Jenai and the Konai were connected with each other by a small streamlet joining them near a place called Nalthi, but the Jamuna and the Konai were separate rivers and used to flow parallel to each other but at a distance one from the other; the two rivers were about 8 to 10 miles apart. This Konai was not therefore a branch of the river Brahmaputra at that time. Even if it was a branch of the Brahmaputra, Konai was a separate stream from Jenai or Jamuna, and there is nothing in the record to show that the Jenai or Jamuna was at any time known as Konai; from Wilcox's map, no doubt, it appears

(1) (1917) 26 C. L. J. 590. (2) (1910) 15 C. L. J. 281.

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Wazed Ali.

Mookerjee, J.

CIVIL.

1921.

Secretary of State  
for India and Council

Wazir Ali.

Mookerjee, G.

that a river which was at the time apparently the main channel of the Brahmaputra, bore the name of Jenai and that it had spread out into two branches, at a spot much above Serajunge, and the western of the two branches was known as the Konai; this bifurcation began at a spot much higher up-stream, from where the Konai of Rennel's map was connected with the Jamuna and at a considerable distance to the north of the spot where the Hakikat Naksas Konai can be located; besides, Wilcox's river Jenai bore the name of Jamuna at its southern extremity; so Wilcox's Jenai or Konai was not the Konai of Rennel or of the Hakikat Naksas. A comparison of the survey map with the other maps goes to show that the river Jamuna did not flow over the disputed lands at the time of the permanent settlement. The map prepared by Sambhucharan Singh on behalf of the Government shows that the river Jamuna used to flow east of Asli Kowapara and east of the newly formed chur and east of Dighulia; both Dighulia and Kowabari or Kowapara were surveyed at the Revenue Survey when the river Jamuna was flowing west of Dighulia and Kowapara; so the bed of the river Jamuna, at the time of the Revenue Survey in 1852-53, was not its bed in 1845, but the river had moved after 1845, westwards to its position in 1852-53; then we have got Lieutenant Wilcox's map and it shows the river running east of Kowapara and Shahapur and at a distance to the east of Kariapukur; at the time of Sambhu Singh's map, the river had thrown up churs east of Kowapara, and so, it had at that place shifted or shrunk a little towards the east from its position at the time of Wilcox's map of 1830-31. Then Wilcox's map shows that Argyola lay at a distance to the west of the river, and near a small stream flowing into it; now according to the Hakikat Naksas of 1826-27 the river Konai ran between Argyola Mehernagar to the east and Purbapara to the west; so it flowed west of Argyola; but the river Jamuna or Jenai of Wilcox flowed to the east of Argyola and at a distance from it, so it did not flow between Argyola to the east and Purbapara to the west, and so the Konai of the Hakikat Naksas did not at the time (1830-31) form part of bed of the river Jamuna or Brahmaputra; the Konai of Hakikat Naksas passed between Argyola and Purbapara but did not pass through or near Kowabari, and so, it could not be the river Jamuna or Jenai of Wilcox's map. Thus we get it, that in 1830-31, the river Jamuna or Brahmaputra or Jenai did not flow over the lands over which it flowed in 1852-53, but passed over lands lying at a distance to their east. Then from Rennel's map we get it that the river Konai passed near a place called Belkuchi and that the

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Wazed Ali.

Mookerjee, J.

River Jamuna flowed at a distance of 8 or 10 miles to the east; the mouzas in dispute are much nearer to Belkuchi than to the river Jamuna of Rennel's map, but there is no mention in Rennel's map of any river or waterway over the tract that was covered by the lands now in dispute and lay between these two rivers. At the time of the Revenue Survey, the river Konai of Rennel's map was existing, though as a small stream, and it still passed by Belkuchi, and the Survey Sheet map shows that a small stream or channel connected that Konai with the Jamuna at the time, and that it passed through or near Purbapara mouza where it joined the Jamuna; the Sheet map also shows that a similar streamlet issuing from the river Jamuna north of Laskarpur, and after passing westwards, took a southerly course, and passed on southwards, past mouza Kole, leaving it to the east. In the Hakikat handsketches, filed by the parties, an arm of the river Konai is shown passing west of Kole, and according to the Hakikat Naksa papers, the river Konai also passed through Laskarpur or between it and Purbapara to the north. The plaintiffs urged that the river Konai of the Hakikat Naksas was a small off-shoot of the Konai of Rennel's map and that the portion of it that had formerly passed between Purbapara and Argyola, had got engulfed in the big current of the river Jamuna after it had moved from east to west from its position in 1830-31 to its bed at the time of the Revenue Survey in 1852-53; they further urged that it was a very small stream and not a deep or navigable river and was part of the property of the owners of the mouzas on its banks. We are of opinion that this is the correct view to take of the case. There is no mention of any river between the Konai and the Jenai in Rennel's map and Wilcox's map does not shew that the river Jamuna or Brahmaputra used to flow over the lands now in suit, but it ran at a distance to the east; on the other hand, it is clear that the bed of the river at the time of the Revenue Survey, was not its bed in 1845, and that in 1830-31, the river flowed very near its bed of 1845. If there had been any deep or navigable river between the mouzas claimed by the plaintiffs, mention would certainly have been made in any of the available maps of Rennel, of Wilcox and of Sambhu, but there is not the least reference to any such thing in any of them. Considering these and other matters we are of opinion that the evidence in the case shows that the lands in dispute were comprised in the mouzas mentioned in the plaint and the two or three other mouzas stated above. We may add that the river Konai of Hakikat Naksas, did not pass near or through the southern mouzas of the said Naksas, and the

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Wazed Ali.

Mookerjee, J.

mouzas Kathenga, with para Matiahatte, Gohalbari with para Majidbari, mouza Janigalia, Asabpur or Asurpara, chuck Jangalia, chuck Gohalbari and Dighulia formed in 1820-21, a compact tract between Bhangabari, Chote Dhul, Khidder and Chapra to the west and Ranjagar and Soloso Jangalia to the east; in that year no river passed through this tract; even if the river Konai of the Hakikat Naksa were held to be the river Jamuna or any other public river, the portion of the disputed land, lying between these two western and eastern boundaries and forming a compact whole, must have formed part of the mouzas lying between them, as mentioned in the Hakikat Naksa papers. In fact, it is clear that in 1781 Konai was a small river distinct from the Brahmaputra and several miles distant from it: in 1831 Brahmaputra or Jamuna had moved westwards, and in 1845 had overflowed the lands now in dispute. There is no foundation for the suggestion that the Konai itself was a public navigable river at the time of the permanent settlement. In this connection the observation of the Judicial Committee in *Haradas v. Secretary of State* (1) may be repeated, that there is no copy of the sanad grant at the date of the permanent settlement, nor of the kabuliyat nor indeed of any intermediate documents affecting the title; but this is rather the misfortune than the fault of the plaintiffs. Importance also cannot be attached to the areas of the mouzas as mentioned in the quinquennial papers; there is nothing to show that at the time of the preparation of the papers, there was a public survey according to which the areas of the mouzas permanently settled had been ascertained. Besides as was pointed out by the Judicial Committee in *Haradas v. Secretary of State* (1) if in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate. As the Subordinate Judge has pointed out the evidence in this case leads to a conclusion which is in conformity with a statement in a well-known work of authority (Hunter's Statistical Accounts of Bengal Vol. VIII page 141). *Secretary of State v. Shanmugaraya* (2); *In re Drachenfels* (3). It is stated there that in 1811 that is, about thirty years after the publication of Rennel's map in 1781, the change of course of the river Brahmaputra had begun to be effected. Rennel's map shows that there was no public river just near the lands in suit which lay at a short distance from Belkuchi on or near

(1) (1917) 26 C. L. J. 550.

(2) (1893) L. R. 20 I. A. 80; I. L. R. 16 Mad. 369.

(3) (1899) I. L. R. 27 Calc. 860.



the river Konai of Rennel's map; Wilcox's map shows that in 1836-37 the river Brahmaputra did not flow over them. The change in the course of the Brahmaputra consequently took place several years after the permanent settlement of 1793. This tends to support the plaintiff's case that this tract was dry land at the time of the permanent settlement and the lands must consequently have at that time formed part of the mouzas pointed out by the plaintiff to the commissioner even though they may have been in part in the bed of the small rivulet Konai. We accordingly affirm the finding of the Subordinate Judge that the lands in suit were comprised within mouzas Purbapara, Argyola, Mehernagar, Gajansahar alias Laskarpur with para Sonekalso, Raneepur, Habbaspur, Kole, Jangalia, Kathenga with Matiahatte, Gohalbari and Majidbari, Asabpur or Asurpara and chuck Jangalia and chuck Gohalbari and Dighulia, and that the bed of the stream Konai of Haki-kat Naksa was part of the mouzas through which it passed. We also affirm the finding of the Subordinate Judge that mouzas Argyola including its para Mehernagar, mouza Purbapara, mouza Gajansahar known as Laskarpur with its para Sonekalso mouzas Ranipur, Habbaspur, Dighulia and Idil Jangalia appertain in entirety to estate No. 26, and 8 annas of mouza Kathenga (kismat) including its para Matiahatte, surveyed as a mouza, and a 12 annas of mouza Kowabari and an 8 annas of Javariapara are comprised in that estate, and that the remaining 8 annas of kismat Kathenga including its para, now, mouza Matiahatte, the entire mouzas Kola and Noada, known as Gohalbari, are comprised in estate No. 543 and the remaining four annas of Kowabari to the estate No. 907. The plaintiffs in each suit have got rights to the extent stated in the plaint, in the lands in dispute included in those mouzas. The plaintiffs have got no right to Majidbari and have failed to prove that it is a para of Gohalbari; they also have been unsuccessful in proving acquisition by adverse possession of any title to any of the lands in suit. It is not necessary to restate the evidence on this part of the case which has been analysed in minute detail with great accuracy by the Subordinate Judge. The summary of the evidence as given by him has been subjected to scrutiny in every particular and has not disclosed any flaw or error. We hold accordingly that the finding of the Subordinate Judge upon the question of title cannot be successfully challenged.

The question of limitation has been argued from a two-fold point of view, namely, first, that the plaintiffs have failed to prove possession or dispossession within twelve years of suit, and secondly, that

CIVIL.

1921.

Secretary of State  
for India in Council

Waxed, Ali.

Mookerjee, J.

CIVIL.

1921

Secretary of State  
for India in Council.

Wazed Ali.

Mookerjee, J.

the plaintiff in suit No. 10 is not entitled to the benefit of either Art. 140 or 144 of the schedule of the Indian Limitation Act. In our opinion, neither of these contentions is well-founded. As regards the first branch of the argument, it is plain that the view taken by the Subordinate Judge must be upheld upon the authority of the decision of the Judicial Committee in *Secretary of State for India v. Krishnamoni Gupta* (1), which over-ruled the case of *Kally Churn Sahoo v. Secretary of State for India* (1), decided by a Full Bench of this Court in 1881. Lord Davey relied upon the earlier decision of the Judicial Committee in *Agency Co. v. Short* (3) in support of the proposition that on the dispossession of a trespasser by the *vis major* of the floods, the constructive possession of the land is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. The Subordinate Judge has correctly held on the evidence that, except as regards a small portion Char Bell specified in his judgment, before the defendant could acquire title by adverse possession for the statutory period, the lands both of Char Sahapur and Char Bell became submerged in 1877, 1891 and 1901 so as to interrupt the adverse possession, and the present suit has been instituted within twelve years from the date of the last emergence. The Subordinate Judge has also correctly applied the test as to the nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner. Such possession must be, as stated by Lord Robertson in *Radhamoni v. Collector of Khulna* (4), adequate in continuity, in publicity, and in extent of area to extinguish the title of the rightful owner. See also *Jogendra Nath v. Baladeo* (5). To the same effect is the judgment of Lord Sumner in *Basanta v. Secretary of State* (6) where it was pointed out that no rational distinction can be drawn between cases where reformed land is after a few years again submerged by the flood for a time; and cases where the re-flooding is seasonal and occurs for several months in each year. Both these contingencies have, as the Subordinate Judge correctly finds upon the evidence, happened in the present case. Consequently, when the land was re-submerged, whether for a period of years or only for a season,

(1) (1902) L. R. 29 I. A. 104; I. L. R. 29 Calc. 518.

(2) (1881) I. L. R. 6 Calc. 725. (3) (1888) 13 App. Cas. 793.

(4) (1900) L. R. 27 I. A. 136; I. L. R. 27 Calc. 943.

(5) (1907) I. L. R. 35 Calc. 561; 6 C. L. J. 735; 12 C. W. N. 127.

(6) (1917) L. R. 44 I. A. 104; I. L. R. 44 Calc. 858; 25 C. L. J. 487.

(7) (1214) 20 C. L. J. 563.

the possession of the Government determined, and while it remained submerged, no adverse possession could be deemed to continue so as to be available towards the ultimate acquisition of title by the Government against the true owner. As regards the second branch of the argument on the question of limitation, it is equally plain that the Subordinate Judge has correctly decided in favour of the plaintiff. The plaintiff in suit No. 10 relies on two circumstances, namely, first, that she is a purchaser from a purchaser at a sale for arrears of revenue held on the 28th March, 1898, and time does not run against her from before the date of the revenue sale; and, secondly, that as her predecessor in interest, her mother-in-law had an interest for life only, time runs against her only from the date of the termination of such life interest, which took place within twelve years of the institution of the suit. Both these contentions are well founded. As regards the first contention, reference need be made only to the case of *Surja Kanta v. Sarat Chandra* (1), where the Judicial Committee ruled that in a sale held under Act XI of 1859 what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run, from the date of the sale. See also *Bilas Chandra v. Akshoy Kumar* (2). As regards the second contention, it is clear that the plaintiff is entitled to the benefit of Art. 140 of the schedule to the Indian Limitation act which provides that a suit by a remainder-man or reversioner for possession of immovable property may be instituted within twelve years from the date when his estate falls into possession. The plaintiff has proved the deed of agreement dated 6th September, 1865 between her husband and his adoptive mother, which was construed by this Court in the cases of *Dinamani v. Elahudad* (3), and *Dinamani v. Elahadut* (4). According to its provisions, the mother-in-law of the plaintiff (the adoptive mother of her husband) was to enjoy the properties of her adopted son for life; she was also to enjoy for life such immovable properties as she might acquire out of the profits of the properties of her adopted son in her possession, and there is no doubt that the mother-in-law of the plaintiff purchased the shares

CIVIL.

1921.

Secretary of State  
for India in Council.

Wazed Ali.

Mosherrjoe, 7,

(1) (1914) 20 C. L. J. 563.

(2) (1912) 15 C. L. J. 436; 16 C. W. N. 587.

(3) (1903) 7 C. W. N. 678.

(4) (1904) 8 C. W. N. 843.

**CIVIL.****1921.**Secretary of State  
for India in Council

Wazed Ali.

Mookerjee, J.

in estates Nos. 26 and 348 out of such profits. Now, the husband of the plaintiff died on the 27th April, 1887, and her mother-in-law died on the 26th February, 1900; the present suit was instituted on the 29th March, 1910. It is thus plain that the plaintiff became entitled to possession only after the determination of the limited or particular estate held by her mother-in-law, whatever its precise nature might have been, and that estate did not fall into possession until her death, which, as we have seen, took place within twelve years before the suit. Art 142 cannot apply as the plaintiff was never in fact dispossessed; nor can Art. 144 apply, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. There is thus no bar to the application of Art. 140, and if that article applies as we hold it does, the suit is not time-barred. The view we take is in accordance with that adopted by this Court in *Promotha Nath v. Dinamani*, (1).

The result is that in each case the decree made by the Subordinate Judge is confirmed and the appeal is dismissed with costs. The cross-appeal is not pressed and is dismissed without costs.

**Buckland, J.**—I agree.

A. T. M.

*Appeals and Cross-appeal dismissed.*

(1) (1907) 34 C. L. J. 129.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

GOPAL KRISHNA NATH

v.

HARI NATH KAPURTH.\*

CIVIL.

1921.

July, 27, 28.

*Ejectment—Tenancy created under decree on consent—Provision for ejectment, legality of, test of—Relief against forfeiture—Executing Court*

The legality of a provision for ejectment is to be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not, in such circumstances, assist the decree-holder to achieve his illegal purpose in defiance of express statutory prohibition: *Huddersfield Banking Co. Ltd. v. Henry Lister & Son* (1) and *Wentworth v. Bullen* (2) referred to.

When a tenancy is created by virtue of a decree on compromise, for a period of nine years to be held at a certain annual rent, the tenant is liable to be ejected only in accordance with the provisions of the Bengal Tenancy Act and not in accordance with the provisions of any contract between the parties to the contrary.

The circumstance that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether, on equitable grounds, relief could have been granted against forfeiture, if it had been called upon to enforce the agreement itself: *Kandarpa v. Banwari* (3) referred to.

It is competent to the Court to grant relief against forfeiture in execution.

Appeal by the Defendant.

Application for execution of decree for ejectment.

The material facts appear from the judgment.

*Babu Subodh Chandra Roy Chowdhury* for the Appellant.

*Babu Rames Chandra Sen* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J. :** This is an appeal by a judgment-debtor against an order for ejectment passed in execution of a decree. The decree was made by consent of parties on the 30th September 1919. A petition of compromise was filed on that date and a decree was drawn up on the basis thereof. Most but not all of the terms of the petition were incorporated in the decree. Under what circumstances, some of the terms were omitted does not appear from the

July, 28.

\*Appeal from Appellate Order No. 46 of 1921, against the decision of B. Sen Esq. Additional Judge of Noakhali, dated the 3rd January, 1921, affirming that of P. C. Roy Esq., Munsiff of Lakhimpore, dated the 22nd June, 1920.

(1) (1895) 2 Ch. 273. (2) (1829) 9 B. & C. 840; 33 R. R. 353.

(3) (1920) 33 C. L. J. 244.

CIVIL.

1921.

Gopal

v.

Hari.

Mookerjee, J.

record. Under the decree, the plaintiff, now the respondent, settled with the defendant, now the appellant, an *osat* raiyati interest in 2 annas 5 gandas share of the lands then in dispute, at an annual rent, of Rs. 40, and for a period of 9 years from 1326 to 1334 B. S. The defendant undertook to execute a registered *osat* raiyati kabuliati in favour of the plaintiff within two months from the date of the decree and also to pay rent in accordance with law. The decree further provided that the defendant would pay to the plaintiff a sum of Rs. 150 as rent for the years 1322 to 1325 as also Rs. 5 as cesses making an aggregate of Rs. 165, and that such payment would be made within 2 months from the date of the decree. In a subsequent clause, it was stated that the defendant would not be able to cut down trees on the lands in suit, and would neither be able to alter their shape in any way nor dig any earth from them or do any act prejudicial to the plaintiff nor be able to transfer them or get any substitution of names. Then followed the provision that if the defendants violated any condition of the compromise, they would be ejected from the lands in suit. The decree-holder made the present application for ejectment of the defendant on the allegation that the kabuliati had not been delivered within the period stated nor had the arrears of rent been paid within two months from the date of the decree. The defendant alleged that the sum had been deposited in Court within the prescribed period and also that the kabuliati had been transmitted to the decree-holder by post. The Courts below have concurrently held that the judgment-debtor had not complied with the terms of the decree, and, in this view, have directed that the defendants be forthwith ejected from the land in execution. We are of opinion that this order cannot be maintained.

It is plain that a tenancy was created by virtue of the decree for a period of nine years from 1326 to 1334 B. S., to be held at an annual rent of Rs. 40. The defendants were consequently liable to be ejected only in accordance with the provisions of the Bengal Tenancy Act. As prescribed by sub-section (1), clause (e) of section 178 of the Bengal Tenancy Act, nothing in any contract between a landlord and a tenant made before or after the passing of the Act, shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the Act. No doubt, the terms of the contract between the parties have been incorporated in the decree made by the Court. But, as was pointed out by the Court of Appeal in the case of *Huddersfield Banking Company Ltd. v. Henry Lister and Son* (1) the real

(1) (1895) 2 Ch. 273.

truth of the matter is that a consent order is a mere creature of the agreement, and if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, L. J., "A consent order is only an order of the Court carrying "out an agreement between the parties." The same idea was expressed in different terms by Mr. Justice Parke in *Wentworth v. Bullen* (1), when he said that the contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of the Judge. Consequently, the legality of the provision for ejectment must be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not, in such circumstances, assist the decree-holder to achieve his illegal purpose in defiance of express statutory prohibition.

Apart from these considerations, it is plain that this is pre-eminently a case in which, assuming that a forfeiture has been incurred, the Court should afford relief against the forfeiture. That it is competent to the Court to grant such relief in execution is clear from the judgment of this Court in the case of *Kandarpa Nag v. Banwari Lal Nag* (2), where the cases on the subject including the earlier decision in the case of *Surendra Nath Banerjee v. Secretary of State for India in Council* (3), will be found reviewed. The circumstance that a consent decree has been passed on the basis of a compromise does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether, on equitable grounds, relief could have been granted against forfeiture, if it had been called upon to enforce the agreement itself. In the present case, it cannot be maintained that the time mentioned, namely, a period of two months was of the essence of the contract. Besides, it cannot be disputed that the tenant has substantially performed what he was required to carry out under the terms of the compromise. He has deposited the money in Court and the sum may be withdrawn by the decree-holder at his choice. The tenant has also transmitted by post the kabuliat to the landlord. Our attention however has been drawn to the fact that the kabuliat does not incorporate one of the terms originally intended to be inserted therein : namely, the clause which would entitle the tenant to ask for renewal of the lease after the expiry of the prescribed term of 9

CIVIL.

1921.

Gopal

v.

Hari.

Mookerjee, J.

(1) (1829) 9 B. &amp; C. 840 ; 33 R. R. 353.

(2) (1920) 33 C. L. J. 244.

(3) (1919) 24 C. W. N. 545.

CIVIL

1921.

Gopal

Hari.

Mookerjee, J.

years. It has been explained on behalf of the appellant that this term was not incorporated because it might create a difficulty in the registration of the agreement as an under-raiyati lease. It is anyhow plain that the omission to insert this term, which would have operated to the benefit of the tenant alone, has not prejudiced the landlord.

In these circumstances, we are of opinion, that a valid tenancy for 9 years was created by the decree, that such tenancy is still in operation, and that the tenant cannot be ejected in execution of the decree.

The result is that this appeal is allowed, the order of the District Judge is set aside and the application for execution is dismissed with costs, in all the Courts.

We assess the hearing-fee in this Court at one gold mohur.

A. T. M.

*Appeal allowed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.  
Justice Panton.*

CIVIL.

1921.

July, 28.

RAJA JYOT KUMAR MUKHERJEE

v.

JADU NATH BOSE AND ANOTHER.\*

*Evidence, admissibility of—Evidence Act (1 of 1872), section 98—Evidence as to meaning of a term—Term ordinarily unambiguous—Extrinsic evidence of usage, if admissible—Improper rejection of evidence by trial Court—Appellate Court, duty of—Civil Procedure Code (Act V of 1908), O. 41, Rr. 27(1) (a), 28, 29*

Various words in written documents which *prima facie* present no ambiguity, may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject matter of the transaction, has been fixed, by parol testimony of the sense in which they were usually received.

Evidence is admissible to show that the term সন (San) did not signify the Bengali year which commences on the first day of Baisakh and ends on the last date of Chaitra but a different period specially applicable to *jalkar* tenancies as stated in the written statement.

\* Appeal from Appellate Order No. 157 of 1920, against the decision of Babu Lal Bihari Chatterjee, Subordinate Judge of Hughli, dated the 10th March, 1920, reversing that of Moultvi Abdul Khaliq, Munsiff of Hughli, dated the 30th April, 1919.



The circumstance that evidence has been improperly excluded from trial Court, does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides in order 41, rules 27 (1) (a), 28, 29 the method to be followed in a case of this description. It is open to the Judge of the appellate Court either to take the evidence himself or to direct the primary Court to take the evidence and to send it to the appellate Court for consideration.

Appeal by the Plaintiff.

Suit for ejectment and mesne profits.

The material facts appear from the judgment.

*Babu Rupendra Kumar Mitter* for the Appellant.

*No one* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal from an order of remand made by the lower appellate Court in a suit for ejectment and mesne profits. The subject-matter of the litigation is the right of fishery in a tank let out by the plaintiff to the defendants on an yearly rent of Rs. 18. The kabuliyat executed by the tenants stated that the tenancy would last for a term of 9 years from 1316 to 1324 (সন). The plaintiff instituted this suit on the allegation that the tenancy had terminated and yet the defendants were in occupation. The Court of first instance decreed the suit. Upon appeal the Subordinate Judge has reversed that decision on the ground that evidence legally admissible had been erroneously excluded by the trial Court. It appears that in the sixth paragraph of the written statement, the defendants allege that the year in respect of jalkars begins from the commencement of the rains, that is, from the month of Asar, that the term of yearly settlement subsists till then, that old fishes are caught till that time and there is right to catch and take the same; and that, according to this practice, settlement of the disputed jalkar was taken in Sraban, 1316, so that the term of the said settlement did not expire before Ashar, 1325. The Court of first instance held that the expression used in the contract was unambiguous and that oral evidence was not admissible to show that the expression সন (San) meant, not the Bengali year which commenced on the first day of Baisakh and ends on the last day of Chaitra, but another period which commences in Sraban and ends in Ashar. The Subordinate Judge has held that evidence was admissible to show that the term সন (San) has, by custom and usage, a special meaning in connection with tenancies of fisheries. In our opinion, the view taken by the Subordinate Judge on this point is correct and is supported by section 98 of the Indian Evidence Act.

CIVIL.

1921.

Raja Jyot Kumar

Jadu.

July, 28.

CIVIL.

1921.

Raja Jyot Kumar

v.  
Jadu

Mookerjee, J.

It is well settled that various words in written documents which *prima facie* present no ambiguity may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were usually received, when employed in cases similar to that under investigation. As an illustration of this principle reference may be made to the decision in the case of *Grant v. Maddox* (1). In that case, the plaintiff, by a written contract, agreed to perform at the defendant's theatre and the defendant agreed to engage her for three years and to pay her a salary of £5, £6 and £7 per week in those years respectively. It was ruled that parol evidence was admissible to show that according to the uniform usage of the theatrical profession, the plaintiff was to be paid only during the theatrical season, that is during the term, that the theatre was open for performance in each of those years. It was argued that the word 'year' was unambiguous, signifying the calendar year which commences on the first day of January and terminates on the last day of December, and that consequently the defendant was bound to pay to the plaintiff at the agreed rate for the 52 weeks included in the year between its commencement and its termination. This contention was overruled. Similar illustrations are afforded by the decisions in *Anon* (2); *R. v. Newstead* (3); *R. v. Sawyer* (4); *Myers v. Sari* (5). In our opinion, evidence was admissible in this case to show that the term সন (*San*) did not signify the Bengali year which commences on the first day of Baisakh and ends on the last day of Chaitra but a different period specially applicable to *jalkar* tenancies as stated in the written statement.

But although the view taken by the Subordinate Judge upon the question of admissibility of evidence is correct, we are of opinion that the order of remand made by him cannot be supported. The circumstance that evidence has been improperly excluded by the trial Court does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides the method to be followed in a case of this description; O. 41, r. 27 (1) (a), 28, 29; it is open to the Judge either to take the evidence himself or to direct the primary Court to take the evidence to send it to the appellate Court for consideration.

The result is that this appeal is allowed, the order of the Subor-

(1) (1846) 15 M. and W. 737; 71 R. R. 815.

(2) (1575) 3 dyer. 345 a, pl. 5.

(3) (1769) Burr. 669. (4) (1836) 10 B. and C. 480.

(5) (1860) 3 E. and E. 306; 122 R. R. 710.

dinate Judge set aside and the case remitted to him to be dealt with in accordance with law. As the appeal has not been opposed, there will be no order for costs in this Court.

A. T. M.

*Appeal allowed : Case remitted :*

CIVIL.

1921.

Raja Jyot Kumar

v.  
Jadu.*Mookerjee, J.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and  
Mr. Justice Panton.*

GOVINDA NATH CHAUDHURI

v.

BASIRUDDIN MANDAL.\*

CIVIL.

1921.

July, 29.

*Limitation—Limitation Act (IX of 1908), Sec. 15 (1)—Limitation, suspension of—Decree, execution of—Injunction—Res judicata—Limitation, plea of, not raised at proper stage.*

Sub-section (1) of section 15 of the Limitation Act contemplates the stay of execution of a decree either by injunction or by order; an injunction to stay execution may be issued in a proceeding other than the execution proceedings, while an order for stay of execution may be made by the execution Court itself in the course of those proceedings.

Where a decree the execution whereof had been stayed, as regards one half share of one of the four properties, by injunction, and as regards the remaining properties, by an order of the execution Court itself :

*Held*, that the decree-holder was entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative.

Where the judgment-debtor had notice of application for execution but omitted to object at the proper stage the order for the issue of the sale proclamation :

*Held*, that the judgment-debtor was not competent, after the sale had taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made.

Appeal by the Decree-holder.

Application for execution of a mortgage decree.

The material facts appear from the judgment.

\* Appeal from Appellate order No. 333 of 1920, against the decision of H. Graham Esq., District Judge of Rajshahi, dated the 13th August, 1920, modifying that of Babu Bepin Bihari Ghose, Subordinate Judge of Rajshahi, dated the 9th January, 1918.

CIVIL.

1921.

Govinda

Basiruddin.

July, 19.

*Babus Mahendra Nath Ray* and *Krishna Kamal Moitra* for the Appellant.

*Rabus Gunada Charan Sen* and *Jitendra Kumar Sen Gupta* for the Respondent.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the decree-holder from an order for partial cancellation of a sale of four properties held in execution of a mortgage decree on the 16th April, 1917. The validity of the sale was challenged on the ground that at the time when the application for execution was made, the decree had become extinguished by limitation and could not consequently form the basis of a valid sale. The Court of first instance dismissed the application. On appeal the District Judge has cancelled the sale in respect of three of the properties. We are of opinion that the order made by the District Judge cannot be supported.

The facts material for the determination of the question argued before us may be briefly stated. On the 1st August 1910, the appellant obtained a mortgage decree against the respondent, which directed the sale of the four properties included in the security. The first application for execution was made on the 30th July 1913. Shortly after this application had been made, a claimant instituted a suit for declaration of title to a half share of the fourth property covered by the mortgage decree. On the 14th November 1913, the claimant obtained an order in his suit for an injunction to stay the sale of the particular property claimed by him, which had been notified for the 15th November, 1913. The decree holder and the judgment-debtor were both parties to that suit and were consequently bound by the order for injunction. On the 15th November 1913 the decree-holder made two applications to the execution Court. In the first application, he asked for leave to bid at the sale and to set off the purchase money against the judgment debt if he should become the purchaser. In the second application, he proved that the three properties which were not covered by the injunction might be brought to sale forthwith. The execution Court, on the first application granted the decree-holder leave to bid at the sale, and on the second application, directed the proper officer to sell the three properties not covered by the injunction and to report the result. The sale was held accordingly, but the report submitted to the Judge showed that the highest bid was inadequate. The sale was thereupon directed to continue till the 18th November 1913; but

this did not lead to any better result. The consequence was that on the 18th November 1913, the execution Court ordered that the entire execution proceedings be stayed till the disposal of the suit instituted by the claimant. Thereafter, on the 21st November 1913, the execution case was dismissed on the ground that no further proceedings could be taken till the disposal of the suit. On the 13th May 1914, the suit of the claimant was decreed and his title to one-half share in the fourth property was declared. On the 8th November 1916 the second application for execution of the mortgage decree was made by the decree-holder. On the 12th December 1916, notice was served on the judgment-debtor under order 21 rule 22 inasmuch as more than one year had elapsed from the date as well of the decree as of the previous application for execution. On the 29th January 1917 notice was served on the judgment-debtor under order 21 rule 66 in order that sale proclamation might be settled. On the 10th February 1917 it was recorded in the order-sheet that as notice had been served and no objection had been taken, the sale proclamation should issue for sale to be held on the 16th April 1917. The sale proclamation was served on the 9th March 1917 and the sale was actually held on the date fixed when the decree-holder became the purchaser. The present proceeding was then initiated for the purpose of cancellation of the sale on the ground that at the time when the second application for execution was made, the decree had already been extinguished by limitation. In our opinion there is no foundation for this contention.

On behalf of the decree-holder reliance has been placed upon the provision of sub-section (1) of section 15 of the Indian Limitation Act, 1908, to the effect that in computing the period of limitation prescribed for any application for the execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order the day on which it was issued or made and the day on which it was withdrawn, shall be excluded. The decree-holder has urged that the period between the 18th November, 1913 and the 31st May 1914 is excluded under section 15 (1), the application for execution presented on the 8th November, 1916, cannot be deemed barred by limitation. The judgment debtor has argued on the other hand that as the injunction related to only one-half of the fourth property covered by the mortgage decree, execution proceedings should not have been stayed in respect of the remaining share of that property and the other three properties included in the decree, and thus the order made by the execution Court for stay of the entire execution proceedings should

CIVIL.

1921.

Govinda  
v.  
Basiruddin.

Mookerjee, J.

CIVIL.

1921.

Govinda

Basiruddin.

Mookerjee, J.

accordingly be regarded as made without jurisdiction. We are unable to accept this contention as well-founded. It may be observed that sub-section (1) of section 15 contemplates the stay of execution of a decree either by injunction or by order; plainly, an injunction to stay execution may be issued in a proceeding other than the execution proceedings, while an order for stay of execution may be made by the execution Court itself in the course of those proceedings. In the case before us, the injunction no doubt related to only one-half share of the fourth property and was issued by the Court which had cognizance of the suit instituted by the claimant. If that injunction had stood by itself, there would have been no stay of the execution proceedings in respect of the remaining properties. This was precisely the view adopted by the execution Court on the 15th November, 1913, and the proper office was directed to sell the properties other than a half share of the fourth property and to report the result to the Court. On the 18th November, 1913, however, the Court proceeded to stay the entire execution case. There can be no question that this order was made with jurisdiction as it is competent to the execution Court to stay execution from time to time. Whether the Court should in the circumstances of the present case have passed an order of that description, is not relevant for the decision of the question raised before us. The order was made with jurisdiction even though it be assumed that the order was not made in the proper exercise of judicial discretion. Besides, we cannot overlook that the decree-holder and the judgment-debtor were equally bound by this order and it is not open to either of them to challenge its propriety in the present proceeding. We are consequently of opinion that this case is covered by section 15 of the Indian Limitation Act. There was in this case a decree the execution whereof had been stayed, as regards one-half share of one of the properties, by injunction, and as regards the remaining properties, by an order of the execution Court itself. Consequently the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made; and the date on which the injunction and the order ceased to be operative.

We may finally add that in this case the judgment-debtor is not competent, after the sale has taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made. The judgment-debtor had notice of this application and by reason of his omission to take objection at the proper stage the order for the issue of the sale proclamation was

CIVIL.

1921.

Govinda

v.

Basiruddin.

Mookerjee, J.

made on the 10th February, 1917. That order could have been made only on a determination, express or implied, that there was a valid application for execution of a subsisting decree. This is precisely a case where it may be asserted that the judgment-debtor, being called on to dispute, if he wished or if he could, a certain proportion of right and consequential demand of relief or action by the judgment-creditor, had allowed the judgment to go by default, resulting in the same consequences as if he had raised and failed in his contention to the contrary. In such circumstances, it is not open to either party, at a subsequent stage of the proceedings, to impugn the validity of the sale; *Krishna Behari v. Brojeswar* (1); *Mungul Pershad v. Grija Kant* (2); *Ram Kirpal v. Rup Kuari* (3); *Raja of Ramnad v. Velusami* (4); *Hook v. A. G. Bengal* (5).

The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower appellate Court. We assess the hearing fee in this Court at two gold mohurs.

A. T. M.

Appeal allowed.

(1) (1875) L. R. 2 I. A. 283.

(2) (1881) L. R. 8 I. A. 123; I. L. R. 8 Calc. 51.

(3) (1893) L. R. 11 I. A. 37; I. L. R. 6 All. 269.

(4) (1920) L. R. 48 I. A. 45; 33 C. L. J. 218.

(5) (1921) L. R. 48 I. A. 187; 33 C. L. J. 405.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice

Panton.

BARANASHI KOER

v.

BHABADEB CHATTERJEE.\*

CIVIL.

1921.

July, 28, 29.

*Limitation—Civil Procedure Code (Act V of 1908), Sec. 48—Time, when runs—Mortgage, decree—Execution sale—Mortgagee not paid in full—Personal decree—Insolvency of judgment-debtor—Application by mortgagee creditor to be entered in the list of scheduled creditors.*

\* Appeal from Original Order No. 206 of 1920, against the decision of S. C. Mullick Esq, District Judge of Hughli, dated the 9th June, 1920.

## CIVIL.

1921.

Baranashi

v.  
Bhabadeb.

Where the mortgage decree directs that if the mortgage debt be not satisfied by the sale of the mortgaged properties, the balance be realised from the property and person of the mortgagor, the term of twelve years under section 48 of the Code of Civil Procedure runs from the date of the decree as fixed by order 20 rule 6 of the Code : *Khulna Loan Co. v. Jnanendra* (1) applied.

A debt barred by the statute of limitation is not provable in bankruptcy proceedings : *Ex parte Deadney* (2).

A debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy.

The bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditor, and all personal remedies against the bankrupt are also thereafter stayed.

On the 3rd October, 1907, the respondent obtained a decree against the appellant in a mortgage suit. The decree directed that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due to the plaintiff (i. e. the respondent) was not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the defendant (i. e. the appellant). The decree was executed and the hypothecated properties were sold, but a large sum was still due under the decree. On the 2nd June, 1918, the appellant made an application under section 6 of the Provincial Insolvency Act to be adjudged an insolvent. The adjudication order was made under section 16 (1) on the 4th April, 1919. On the 21st May, 1920, the respondent, as judgment creditor of the insolvent, applied under section 24 to have his name entered in the list of the scheduled creditors.

*Held*, that as when the adjudication order was made, the decree had not become barred by limitation, nor had the right thereunder become extinguished by the application of the rule contained in section 48 of the Code of Civil Procedure, the application of the respondent was not barred.

Appeal by the Judgment-debtor.

Application by the Respondent to have his name entered in the list of scheduled creditors.

The material facts are stated in the judgment.

*Dr. Dwarka Nath Mitter, Babus Biroj Mohan Majumdar and Khitish Chunder Chuckerbutty* for the Appellant.

*Babu Mahendra Nath Ray and Baranashibasi Mukherjee* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal from an order made under sub-section 2 of section 24 of the Provincial Insolvency Act of 1907. The events antecedent to the order may be briefly stated.

(1) (1917) 22 C. W. N. 145. (2) (1808) 15 Ves. 479.

July, 29.



Civil,  
1921.  
Baranashi  
v.  
Bhabadeb.  
Mookerjee, J.

On the 3rd October 1907, the respondent obtained a decree against the appellant in a mortgage suit. The decree directed that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due to the plaintiff was not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the defendant. The decree has been executed and the hypothecated properties have been sold, but a large sum is still due under the decree. In the case of a decree of this character, the period of limitation applicable runs not from the date of the sale of the mortgaged property, but from the date of the decree as fixed by O. 20, R. 6, C. P. C.; *Khulna Loan Coy. v. Jnanendra Nath Bose* (1). The same principle must be applied to test the applicability of section 48, C. P. C., which provides that where an application to execute a decree (not being a decree granting an injunction) has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed. Consequently, in the present case, the term of 12 years must be taken to run from the 3rd October, 1907.

It appears that on the 22nd June, 1918, the appellant made an application under section 6 of the Provincial Insolvency Act, 1907 to be adjudged an insolvent. The adjudication order was made under section 16 (1) on the 4th April, 1919. The result of this adjudication order was that under section 16(2), the whole of the property of the insolvent became vested in the Court and thereafter no creditor to whom the insolvent was indebted in respect of any debt provable under the Act could, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court might impose. Under section 16(4), a similar consequence followed in respect of all such property as might be acquired by or devolve on the insolvent after the date of the order of adjudication and before his discharge. Under section 16(6), the adjudication order also related back and took effect from the date of the presentation of the petition on which it was made. On the 21st May, 1920, the respondent, as judgment creditor of the insolvent, applied under section 24 to have his name entered in the list of scheduled creditors, and the application was granted on the 9th June, 1920. The validity of this order is now questioned on the

(1) (1917) 22 C. W. N. 145.

CIVIL.

1921.

Baranashi

Bhabadeh

Mookerjee, 9-

ground that on the 21st May, 1920, when the application under section 24 was made, it had become impossible for the mortgagee decree-holder to apply for execution in the face of the provisions of section 48, C. P. C. In our opinion, there is no room for doubt that this contention has been rightly over-ruled by the District Judge.

It is well-settled that a debt barred by the statute of limitation is not provable in bankruptcy proceedings. This rule was enunciated by Lord Eldon in *Ex parte Dewdney* (1) and was reaffirmed by him in *Ex parte Roffey* (2). But it is equally plain that the bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. This principle is deducible from the provisions of the Provincial Insolvency Act, 1907 which make it impossible for a creditor to take proceedings in execution after the adjudication order has been made and during the pendency of the insolvency proceedings. The rule has been recognised and applied in England in cases of high authority. In *Ex parte Ross* (3); this principle was enunciated by Vice-Chancellor Leach; on appeal against his order, Lord Lyndhurst observed that the effect of the commission in bankruptcy clearly is to vest the property in the assignee for the benefit of the creditors; they are, therefore, in fact trustees, and it is an admitted rule that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by the lapse of time. The question was again raised in *Ex parte Lancashire Banking Corporation* (4) where Bacon C. J. observed as follows: “The argument founded on the statute of limitation as an answer to this claim is not tenable for a moment. The statute of limitation has nothing to do with the bankruptcy laws. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor’s rights are established and the creditor’s rights are established in the bankruptcy and the statute of limitation has no application at all to such a case or to the principles by which it is “governed.” This rule has been recognized in later cases amongst others, in *Re Crosley* (5); *Re Stock* (6) and *Re Cullwick* (7). It may at first sight appear that in *Re Benson* (8) a different view

(1) (1808) 15 Ves. 479.

(2) (1815) 19 Ves. 468; 2 Rose 245.

(3) (1827) 2 Gl. and J. 46, 330. (4) (1878) 10 Ch. D. 776 (784).

(5) (1887) 35 Ch. D. 266.

(6) (1896) 3 Manson 324; 66 L. J. Q. B. 146.

(7) (1918) 1 K. B. 646.

(8) (1914) 2 Ch. 68 (75).

was indicated. In that case debts were incurred by the bankrupt, before his two bankruptcies which occurred in 1890 and 1892. He was the donee of a general testamentary power of appointment and died in 1911, having exercised the power by his will but without having obtained his discharge. The Court held that the statute of limitations applied and that the creditors who had proved in the bankruptcy were barred and not entitled to be paid out of the appointed fund. Channell J. in delivering the judgment of the Court stated that cases were quoted beginning with *Ex parte Ross* (1) which showed that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy and of this there can be no doubt, but this is only in the bankruptcy. The learned Judge further added as follows: "The real difficulty in the way of the appellants is the well-established rule that if the statute once begins to run it continues to run whatever happens." No such difficulty however arises in the case before us because in the events which have happened the Court is not called upon to make an order for execution of the mortgage decree. Indeed under the provisions of the Provincial Insolvency Act if such application were made it would not have been entertained. Consequently there is no question of the applicability of section 48 and the name of the respondent has been rightly entered in the list of scheduled creditors because at the time when the adjudication order was made the decree had not become barred by limitation nor had the right thereunder become extinguished by the application of the rule contained in section 48.

The result is that the order of the District Judge is affirmed and this appeal dismissed with costs—one gold mohur.\*

A. T. M.

*Appeal dismissed.*

(1) (1827) 2 Gl and J, 330

CIVIL.

1921.

Baranashi

Bhabadab.

Mookerjee, J.

## CRIMINAL REFERENCE.

*Before Mr. Justice Teunon and Mr. Justice Sukrawardy.*

CRIMINAL.

1921.

May, 17.

EMPEROR

v.

ABED ALI TUFANI.\*

*Criminal Procedure Code (Act V of 1898), Sec. 133—Removal of unlawful obstruction—Fixing arbitrarily time for cross-examination—Finding as to bona fides of claim.*

The Sub-Divisional Magistrate in a proceeding under section 137 of the Code of Criminal Procedure for removal of unlawful obstruction to a water channel, fixed five minutes for the cross-examination of the witnesses. He also did not come to any clear finding as to the *bona fides* of the claim set up by the party against whom the order was directed :

*Held*, that the order passed under section 137 of the Code of Criminal Procedure, was bad.

Reference under section 438 of the Code of Criminal Procedure.

Order under section 137 of the Code of Criminal Procedure for removal of unlawful obstruction.

The material facts appear from the judgment.

*Babu Dinesh Chandra Roy* for the Accused.

*Mr. Orr* for the Crown.

The judgment of the Court was as follows :

This case comes before us in a Reference made under the provisions of section 438 of the Code of Criminal Procedure by the learned Sessions Judge of Pabna. It is directed against an order made or purporting to be made under the provisions of section 137 Cr. P. C. by the Sub-Divisional Magistrate of Sirajgunge. By this order he directs the removal of two obstructions to a certain drain or water channel, one such obstruction being a wall north to south for a distance of 9 feet from the northern extremity thereof, another a wall running east and west along the bed of the Channel. The Reference is made on a number of grounds some of which do not appear to be well founded. But we are of opinion that we must accept the Reference and set aside the order to which we have referred on two grounds namely that the Sub-Divisional magistrate appears to have fixed arbitrary limit of time

\* Criminal Reference No. 49 of 1921, made by D. G. Davies Esq, Sub-Divisional Magistrate of Sirajganj, dated the 16th December, 1920.

namely 5 minutes for the cross-examination of the witnesses and secondly, on the ground that he comes to no clear finding as to the *bona fides* of the claim set up by the second party, that is to say the party against whom the order is directed.

For these reasons we set aside the order and direct that the proceedings be taken up at the point reached on the 15th December and that the case be retried and heard and disposed of in accordance with law. The trial will take place in the Court of a stipendiary Magistrate exercising the powers of a Magistrate of the first class at the head quarter station of the District of Pabna, such Magistrate to be nominated by the District Magistrate.

A. T. M.

*Order set aside : Retrial ordered.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and  
Sir Ernest Edward Fletcher, Knight, Judge.*

JNANENDRA KRISHNA BOSE

v.

SINCLAIR MURRAY &amp; CO.\*

*Suit, stay of—Indian Arbitration Act (IX of 1899), section 19—Matter agreed to be referred.*

Before an order for stay of suit can be made under section 19 of the Indian Arbitration Act, it must be established that the suit has been instituted in respect of a matter agreed to be referred: *T. W. Thomas and Co. Ltd. v. Portsea Steamship Company Ltd.* (1) and other cases referred to.

Appeal by the Plaintiff.

Suit for recovery of a sum of money.

Application for stay of suit.

The material facts appear from the judgment of

**Buckland, J.,** :—On the 3rd July 1919, the parties to this application entered into a contract whereby Messrs. J. K. Bose & Co, sold to Messrs. Sinclair Murray & Co., 500 bales of jute upon

\* Appeal from Original Order No. 54 of 1920, against the order of Mr. Justice Buckland, dated the 3rd April, 1920.

(1) (1912) App. Cas. 1.

CRIMINAL.

1921.

Emperor

v.  
Abed Ali.

CIVIL.

1920.

June, 16.

April, 3

CIVIL.

1920.

Jnanendra

Sinclair Murray &  
Co.

Buckland, J.

certain terms which are not material to this application with the exception of the arbitration clause in the contract. This clause is one with the terms of which this Court is familiar, and provides for disputes arising out of the contract to be referred to the arbitration of the Bengal Chamber of Commerce. J. K. Bose who carried on business under the name of J. K. Bose & Co. has filed a suit against the applicants Messrs. Sinclair Murray & Co., for a decree for Rs. 1,500 by way of damages for breach of the contract, for a declaration that it is a nullity, and that it should be cancelled, and for an injunction restraining the defendant firm from proceeding with a reference to the arbitration of the Bengal Chamber of Commerce. This application has been made on behalf of Messrs. Sinclair Murray & Co., under section 19 of the Indian Arbitration Act to stay that suit. The matters in issue in the suit are matters which the arbitrators are competent to decide, and under section 19 of the Act I must be satisfied that there is no sufficient reason why the matter should not be referred and secondly, that the applicants at the time when the proceedings were commenced were and still are ready and willing to proceed to arbitration.

It is urged that I should not exercise my discretion in favour of the applicants in the circumstances of this case. There are two ways of regarding this application there is the narrow view, strictly in accordance with the section under which I should see whether or not the matter in issue in the suit is one which is within the arbitration clause, and whether the terms of the section are otherwise complied with. That view takes no account of the claim which the applicants desire to refer. The other is the broad view which takes account of the real point of substance, which is the same both in the suit and in the arbitration proceedings which Messrs. Sinclair Murray & Co., desire should take place with reference to their claim against J. K. Bose. I think that I am entitled to take the latter because this is not the normal case for which the section primarily provides, where a party to a submission files a suit and the sole question is whether that claim should be referred to arbitration or decided by the Court in the suit.

The circumstances of the matter are as follows: On the third July a contract similar to that between the applicants and J. K. Bose was entered into between Messrs. Sinclair Murray & Co., and Messrs. D. L. Millar & Co. The latter were the buyers thereunder. Messrs. D. L. Millar & Co., made a claim in respect of the goods which the applicants received from J. K. Bose under their contract with J. K. Bose and delivered under their contract with Messrs.

D. L. Millar & Co., and an arbitration was held by the Bengal Chamber of Commerce. In that arbitration Messrs. Sinclair Murray & Co., put forward a number of contentions which are to be found in an exhibit annexed to the affidavit of J. K. Bose filed on this application, among which were that the goods were delivered in time; that they were of contract quality, and that the Bengal Chamber of Commerce had no jurisdiction. Primarily these contentions were put forward by J. K. Bose in response to Messrs. Sinclair Murray & Co., but the latter adopted them and made them their own. J. K. Bose did so though he had taken up the position that he was not a party to the contract under which that arbitration was held and had nothing to do with it. An award was made on the 27th November 1919 in favour of Messrs. D. L. Millar & Co., by which Messrs. Sinclair Murray & Co., were directed to pay Rs. 9625 and costs. Messrs. Sinclair Murray & Co. claimed that amount from J. K. Bose, and at the end of January last took steps to refer their claim to arbitration. The suit was filed on the 2nd February this year, and I hold therefore that at the time when the suit was commenced Messrs. Sinclair Murray & Co. were, and still remain, ready and willing to do all things necessary for the proper conduct of the arbitration. It has been urged that the order now asked for should not be made in the applicants' favour in view of their attitude; first, because they now suggest that they were merely brokers though the two contracts were entirely distinct. Mr. Blount in his affidavit treats his firm's claim as if it were almost a matter of course by reason of Messrs. Sinclair Murray & Co. being merely brokers in the transactions. This view I do not agree with. The two contracts are entirely distinct, and Messrs. Sinclair Murray & Co. are named as principals in each. Another ground urged is that Messrs. Sinclair Murray & Co. are bound by what they put forward at the arbitration between Messrs. D. L. Millar & Co. and themselves and they cannot now resile from what they then said. That is a matter which J. K. Bose can urge before the arbitrators and one which the arbitrators should consider. Were this all that I had to consider I might have been disposed to refuse this order, but I cannot ignore the plaintiff's attitude. In view of the fact that J. K. Bose was ready enough to make submissions for Messrs. Sinclair Murray & Co. to place before the arbitrators when he was not directly involved, while as soon as he was faced with a reference he filed a suit to avoid it, I do not think he is entitled to a very great deal of consideration. This suit moreover is one of those which have become more frequent of late in this Court and are filed in order

CIVIL.  
1920.  
Jnanendra  
v.  
Sinclair Murray &  
Co.  
Buckland, J.

CIVIL:

1920.

Jnanendra

Sinclair Murray &  
Co.

Buckland, J.

June, 16.

to stifle arbitration proceedings. The conduct of a plaintiff to such a suit is therefore a material factor in considering whether or not he should be allowed to proceed with it.

Having regard to all the circumstances and to the fact that the applicant has complied with the section, an order to stay the suit will be made in terms of the prayer of the petition with costs.

Against this order, the plaintiff appealed.

*Messrs. Jackson, H. D. Bose and M. N. Bose* for the Appellant.  
*Sir A. Chaudhuri and Mr. Amir Ali* for the Respondents.

The judgments of the Court were as follows :

**Mookerjee, A. C. J.**—This is an appeal from the judgment of Mr. Justice Buckland on an application under section 19 of the Indian Arbitration Act, 1899, for stay of a suit.

It appears that on the 3rd July, 1919, the appellant J. K. Bose sold certain goods to the respondents Sinclair Murray & Co. On the same date, there was a sale of the identical goods by Sinclair Murray & Co. to D. L. Millar & Co. Subsequently, disputes arose between Sinclair Murray & Co. and D. L. Millar & Co., with the result that there was a reference to arbitration in terms of the arbitration clause contained in the contract between those parties. This reference resulted in an award for a large sum of money in favour of D. L. Millar & Co. against Sinclair Murray & Co. Sinclair Murray & Co. thereupon claimed to recover from J. K. Bose the sum which they had been made liable to pay to D. L. Millar & Co. On this, J. K. Bose instituted the present suit for recovery of a sum of Rs. 1500 from Sinclair Murray & Co. Sinclair Murray & Co. then applied under section 19 of the Arbitration Act to stay the suit.

Mr. Justice Buckland states in his judgment that towards the end of January 1919, Sinclair Murray & Co. took steps to refer their claim against J. K. Bose to arbitration, and that thereupon, on the 22nd February the present suit was instituted by J. K. Bose against Sinclair Murray & Co. This, apparently, was a mistake. At the time when the suit was instituted by J. K. Bose against Sinclair Murray & Co. no reference had been made by the latter to the Bengal Chamber of Commerce Arbitration Tribunal in terms of the arbitration clause contained in the contract between them. That clause was in these terms, "Any dispute arising on or out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce under its rules applicable for the time being for decision, and such decision shall be accepted as final and binding on both the parties to this contract." The object apparently is to force J. K.



Bose to have recourse to the arbitration clause. Mr. Justice Buckland has held that under the circumstances of the case the suit should be stayed. We are of opinion that this order cannot be supported.

Section 19 of the Indian Arbitration Act provides that "Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings...." Consequently, before an order can be made under section 19, it must be established that the suit has been instituted in respect of a matter agreed to be referred. We have read the plaint in the suit instituted by J. K. Bose: and, in view of the order which we propose to make, we shall not discuss its terms. We need only observe at the present stage, that from the plaint it is by no means clear that the claim of Rs. 1,500 relates to a matter agreed to be referred. That it is essential that the claim should relate to a matter agreed to be referred, is established by the decision of the House of Lords in *T. W. Thomas & Co. Ltd. v. Portsea Steamship Company Ltd.* (1). It is well settled by a long series of cases that the Court will refuse a stay, where the action commenced relates to matters outside the submission; *Smith v. Allen* (2); *Daint v. Lazard* (3); *Lawson v. Wallasey Local Board* (4); *Swiney v. Ballymena* (5); *Workman v. Belfast Harbour* (6). We further find that Sinclair Murray & Co. did not apply to the Court to compel J. K. Bose to give further particulars, so that it might be ascertained what was the real basis of the cause of action alleged by J. K. Bose against them. They did not do so, it is said, because they apprehended that such attempt on their part might be treated as equivalent to taking a step in the proceedings and might thereby disqualify them from having the benefit of section 19. The appellants have argued that the apprehension was really groundless and that mere request to be further informed of the matter alleged against the respondents could not constitute a step in the proceedings. But we need not discuss whether such apprehension was or was not well founded, in view of the observations in *Ives v. Willans* (7) and whether the respondent would have

CIVIL.

1920.

Jnanendra

Sinclair Murray &  
Co.

Mookerjee, A. C. J.

(1) (1912) App. Cas. 1.

(3) (1848) 27 L. J. Ex. 399.

(5) (1888) 23 L. R. Ir. 123.

(7) (1894) 2 Ch. 478.

(2) (1862) 3 F and F. 156.

(4) (1883) 11 Q. B. D. 229.

(6) (1899) 2 T. R. 234.

CIVIL.

1920.

Janendra.

Sinclair Murray &  
Co.

Mookerjee, A. C. J.

been affected by the decision in *Parker v. Turpin* (1). This much is clear that there is no reason why, for the purposes of section 19, the Court should not compel J. K. Bose to give further particulars, so as to enable the Court to determine, whether the claim of Rs. 1,500 can be treated as a matter agreed to be referred under the contract between J. K. Bose and Sinclair Murray & Co. In these circumstances, it is impossible for us to uphold the order of Mr. Justice Buckland.

The result is that the appeal is allowed, the order made by Mr. Justice Buckland set aside and the matter remitted to him in order that he may reconsider it and determine, after taking such steps as he may consider necessary to ascertain from the plaintiff the basis of his claim against Sinclair Murray & Co., whether an order should or should not be made under section 19 of the Indian Arbitration Act.

The costs of this appeal will be costs in the proceedings.

The hearing of this matter will be expedited as far as practicable.

**Fletcher, J.**—I agree.

*Babu Krishna Kishore De* : Attorney for the Appellant.

*Messrs Orr, Dignam & Co.* : Attorneys for the Respondents.

A. T. M.

*Appeal allowed : case remitted.*

(1) (1918) 1 K. B. 359.

## APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Buckland.*

W. J. REES.

v.

JOHN YOUNG\*.

CIVIL.

1921.

February, 16.

*Collision—Flaint—Determination in a cause—Defendant's opportunity to meet plaintiff's case—Appellate Court—Conflict of testimony.*

The determinations in a cause should be founded upon a case either to be

\*Appeal from Original Decree No. 311 of 1919, against the decree of Babu Phonindra Mohan Chatterjee, Subordinate Judge, 2nd Court, of Burdwan, dated the 20th September, 1919.

found in the pleadings or involved in or consistent with the case thereby made: *Eskenchunder v. Shamachurn* (1).

The fact that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet, is of special importance in collision cases, where the accident happens very often in an entirely unexpected manner and in an extremely short space of time, thus rendering an accurate observation of the elements of the incident difficult in the highest degree. In this class of cases, it has consequently been considered specially necessary that the plaintiff, in framing his statement of claim, should set out the circumstances of the collision, so far as they are known to him, with clearness and accuracy to enable his adversary to know the case he has to meet; he should also state in specific terms the particular acts of negligence which, according to him, caused the collision.

In order to reverse the decision of the Court below upon a point where there is a clear conflict of testimony, the Court of appeal should, not merely entertain doubts whether the decision below is right but be convinced that it is wrong *Bland v. Ross* (2).

Appeal by the Defendant.

Suit for damages.

The material facts appear from the judgment of Mookerjee J.

*Babus Dwarka Nath Chuckerbutty and Mritunjoy Chatterjee* for the Appellant.

*Mr. Langford James and Babu Ambikapada Chaudhuri* for the Respondent.

The judgments of the Court were as follows:

**Mookerjee, J.**—This is an appeal by the defendant in a suit for damages. The plaintiff is a blast furnace keeper in the Bengal Iron and Steel Co.; the defendant is a Superintendent of collieries. On the night of the 9th December, 1916, the plaintiff was proceeding on his motor cycle from Asansol to Kulti along the Grand Trunk Road, the defendant was driving his motor car in the opposite direction. The car and the cycle collided with the result that the cycle was damaged and the plaintiff sustained severe injuries. He was detained in hospital for a considerable time and has become maimed and disfigured for life. The plaintiff asserts that the collision was due to the negligence of the defendant and claims Rs. 10,534 as damages. The substance of the case for the plaintiff is set out in the third and fourth paragraphs of the plaint filed on the 6th August 1917, where it is alleged that while the plaintiff was proceeding on his motor cycle along the left side of the road, he saw two motor cars coming at a great speed from the opposite direction one behind the other, that the plaintiff passed the first

CIVIL.

1921.

W. J. Rees

John Young.

February, 16.

(1) (1866) 11 M. I. A. 7; 6 W. R. P. C. 57.

(2) (1866) 14 Mos. P. C. 210 (235).

CIVIL.

1921.

W. J. Rees

John Young.

Mookerjee, J.

motor car whereupon the defendant who was driving his car just behind the first car, without any warning and contrary to the rules of the road, suddenly and negligently swerved out at a high and dangerous pace to the right in order to pass the first car, with the result that his car dashed into the cycle of the plaintiff. The case for the defendant is set out in the seventh paragraph of his written statement filed on the 1st October 1917, in which it is stated that he had passed the car in front (which was driven by one Mr. Gibson) as also another gentleman (one Mr. Hall) who was coming in a motor cycle evidently in the same direction as the plaintiff, and that thereafter the plaintiff ran into and collided with his car. The defendant states that the distance between Mr. Gibson's car and Mr. Hall's cycle was 100 ft. and that between Mr. Hall's cycle and the plaintiff's cycle was 300 ft. He further adds that at the moment of collision, he was proceeding by his left side of the road, leaving more than half the width of the road for vehicles coming from the opposite direction to pass. In the 8th paragraph of the written statement, the defendant alleges that on enquiry he learnt that the plaintiff had consumed a quantity of spirits at a refreshment room at Asansol which made him negligent, reckless and confused, and accounted for his suddenly running into the car. The respective allegations, it may be observed, had been formulated by the parties in the course of correspondence antecedent to the suit, namely, on the 19th May 1917, on behalf of the plaintiff and the 19th June 1917, on behalf of the defendant. The Subordinate Judge has found that the collision was brought about by negligence on the part of the defendant. He has disbelieved the story that the plaintiff was under the influence of liquor and, unable to control himself, dashed into the car of the defendant. He has also accepted the plaintiff's story that the accident happened at the time when the defendant was trying to pass Mr. Gibson's car. The Subordinate Judge has accordingly decreed the suit, holding, as regards the measure of damages, that the amount claimed was not unreasonable. On the present appeal, the judgment of the Subordinate Judge has been attacked on the ground that his conclusions are not supported by the evidence on the record and that he has in fact given the plaintiff a decree on a theory inconsistent with the case made in the plaint. It has not been disputed on behalf of the respondent that as pointed out by Lord Westbury in *Eshenchunder v. Shama Churn* (1) and recently affirmed by Sir Lawrence Jenkins in

(1) (1866) 11 M. L. A. 7; 6 W. R. P. C. 57.

*Malraju v. Venkatadri* (1), is absolutely necessary that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. The fundamental principle that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet is of special importance in collision cases, where the accident happens very often in an entirely unexpected manner and in an extremely short space of time, thus rendering an accurate observation of the elements of the incident difficult in the highest degree. In this class of cases, it has consequently been considered specially necessary that the plaintiff, in framing his statement of claim, should set out the circumstances of the collision, so far as they are known to him, with clearness and accuracy to enable his adversary to know the case he has to meet; he should also state in specific terms the particular acts of negligence which, according to him, caused the collision (see the observations of Lord Chelmsford in *The Alice & the Rosita* (2)). We have consequently to consider, whether the accident took place in the manner described in the plaint.

In the determination of this question, we must remember that according to the plaintiff he was always on his proper side of the road; the defendant did not seriously challenge this, but asserted that the plaintiff was so intoxicated that he lost all control over himself and ran into the car. This theory has been negatived by the Subordinate Judge, and in my opinion no solid foundation was laid for it in the evidence. Immediately after the accident, a medical man was on the spot; no suggestion was made to him by the defendant that the plaintiff was intoxicated; and the information subsequently collected with much assiduity from the refreshment room is entirely inconclusive. In this Court, no endeavour has been made to controvert the conclusion of the Subordinate Judge on this point. The position consequently is that the assertion of the plaintiff that he was on the proper side of the road practically remains uncontradicted, while the only theory suggested why he should have run into the car of the defendant has completely broken down. We pass on next to the case of the defendant. Admittedly, there was another car in front of his car; he did swerve out of what was his proper track with a view to get in front of that car; to this extent, he did violate the rule of the road. He is thus constrained to take up the position that he successfully passed the car in front and managed to get again on the proper side of the road before the ac-

CIVIL.

1921.

W. J. Rees

v.

John Young.

*Mookerjee, J.*

(1) (1920) 40 M. L. J. 144.

(2) (1868) L. R. 2 P. C. 214.

Civil.

1931.

W. J. Rees

v.  
John Young.

Mookerjee, J.

cident had happened. The burden of establishing this assertion lies primarily on him. If this allegation is not proved, the accident is explained. Upon the question, whether he had actually passed the car in front of him and regained the proper side of the road, the evidence is conflicting. The plaintiff asserts that the first car passed him quite safely and the second car, evidently with the object of passing the first car, swerved out of its way, thereby catching him just when he had passed the first car. His statement is quite precise and he adds that when the rear car struck him, some portion of it caught his right thigh and some other portion caught his right leg below the knee. Mr. Hall first came up to him, after the accident, and the plaintiff is definite that both the cars had passed Mr. Hall before the accident. This description is borne out by Mr. Hall. He states that he and the plaintiff left the refreshment room together, but outside the station he went ahead. He then waited for the plaintiff to come up to him and was about 100 ft. to 150 ft. off from the place of accident. He saw the two cars pass him, and immediately after the second car had passed him, it swerved to the right, evidently with the intention of overtaking and passing the first car. At that time, the plaintiff was approaching from the opposite direction. He then describes how the plaintiff struck the side of the second car as the position of the second car did not give the plaintiff room enough to pass. The witness substantially adhered to this description even after a severe cross examination. I see no reason to distrust the testimony of Mr. Hall and there is no doubt that he could see how things happened in the bright moon-light as it was the night of the full moon. On the other hand the defendant asserted that he had passed the car in front of him and had reached the proper side of the road before the accident happened, and in this version he was supported by his wife who was with him in the car. There is thus a clear conflict of testimony upon this the fundamental point in the case. The Subordinate Judge has accepted the version given by the plaintiff. I am unable to say that the story narrated by the defendant should have been preferred; it is to my mind plain that his estimate of the distances between the cars and the cycles and the speeds of the two cars is inaccurate. The same remark applies to the evidence of Mr. Gibson. This is precisely the class of cases where a Court of appeal should, as Lord Kingsdown said in *Bland v. Ross* (1) in order to reverse the decision of the Court below upon a point of this des-

(1) (1860) 14 Moore P. C. 210, (235)

CIVIL.

1921.

W. J. Rees

John Young.

Mookerjee, J.

cription, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. The same view has been emphasised by the Judicial Committee in later collision cases : *The Alice* (1) ; *The Tasmania* (2) ; *R. S. N. Co. v. Hathor S. Co.* (3) ; No doubt, as was observed in *The Glanibanta* (4), the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind in deciding a point on which there is a conflict of oral testimony that it has neither seen nor heard the witnesses and should consequently make due allowance in this respect. In the present case, we have the cardinal fact that the defendant at one stage took his car to the wrong side of the road which would inevitably lead to an accident if another vehicle came from the opposite direction before the car could be taken again to the proper side of the road. That the car of the defendant did actually get back to the proper side has not, according to the Subordinate Judge, been established by the evidence, and I do not see adequate grounds to dissent from this conclusion.

I may add that the Subordinate Judge properly declined to draw any inference adverse to the plaintiff merely from the position in which he was found lying on the road immediately after the accident. It is manifestly impossible to reconstruct, even in imagination and with any approach to accuracy, the conditions under which the collision took place, solely from the position in which one of the occupants of the cycle or car is found after the accident ; that position is the resultant of a number of factors which are absolutely unknown in the case before us. I hold accordingly, in concurrence with the Court below, that the accident was due to the negligence of the defendant.

As regards the quantum of damages, no conclusive reasons have been assigned in support of the contention that the assessment has been excessive ; it is certainly neither perverse nor based upon a misconception of the facts of the case.

The result is that the appeal must be dismissed with costs.

**Buckland, J.**—On the 9th December 1916 the plaintiff had been spending the evening at Asansol, and at about 11 p.m. he left to return to Kultī, a place about ten miles away, where he lived. A Mr. Hall accompanied him, and they both rode motor

(1) (1868) L. R. 2 P. C. 245.

(2) (1890) 15 A. C. 223.

(3) (1916) 20 C. W. N. 1023.

(4) (1876) 1 P. D. 283.

CIVIL

1921.

W. J. Rees.

John Young.

Buckland: 9.

cycles. The defendant and his wife and child, and a Mr. Gibson and his wife, had been spending the same evening at the house of a Mr. Mackay, which lies off the road from Asansol along which the plaintiff had to travel. Shortly after 11 p.m. Mr. Mackay's guests left his house in two motor cars, the Rees being in one and the Gibson in another. Very soon after they had turned into the main road they passed Mr. Hall, who was in front of the plaintiff and was standing by the side of the road waiting for the plaintiff to overtake him. This the plaintiff never did, for within a very short time of the cars passing Mr. Hall the plaintiff's motor-cycle and the defendant's car collided, with the result that the plaintiff was thrown on the road and sustained severe injuries, his motor cycle also being considerably damaged. The plaintiff brought the suit, which has resulted in this appeal, for damages which he has suffered in consequence of the collision which he says was due to the negligence of the defendant.

The plaintiff's case is that he had passed one of the cars when the other, which was occupied by the defendant, swerved out into the road in order to pass the first car and in so doing collided with his motor-cycle which was on its proper side of the road.

The defendant's case is that he had already passed the other car in pursuance of something that was said before the cars left Mr. Mackay's house, and that his car was leading. He denies that he swerved at all and says that "for some reason," as he puts it in one of his letters, the plaintiff turned into his car, which he says was on his own side of the road.

On the cases as presented by the parties there is therefore a direct conflict of evidence as to (1) which of the cars was leading, (2) the position in the road of the defendant's car, (3) whether the plaintiff turned into the defendant's car.

The Subordinate Judge has found that the accident was due to the negligence of the defendant. His findings as to the relative positions of the two cars are not clear, but he does not accept the allegations of the defendant and his witnesses as to the defendant's car having passed the other and being 200 or 300 feet ahead. He has found that the accident happened to the south of the centre of the road, which means that the defendant's car was not in its proper track at the time of the collision. This finding also impliedly negatives the defendant's case that the plaintiff turned into him. In effect the Subordinate Judge has accepted the evidence of the plaintiff and rejected that of the defendant and of his witnesses.

The plaintiff's account of the incident is contained in a very few



lines of his evidence. He said:—"When the two motors approached me, the first car passed me quite safely and the second car, evidently with the object of passing the first car, swerved out of its way, and caught me just as I had got past the first car. . . . As I passed the first car the rear car came across the road evidently with the intention of passing the first car. But when the rear car struck me some portion of the rear car caught my right thigh, some other portion of the car caught my right leg below the knee. This knocked me on to the side of the car which went past."

I do not propose to examine in detail the evidence of the defendant and of his witness Gibson as to their positions at the time of the accident. The Subordinate Judge has not accepted it and I am not prepared to say that he ought to have done so. They both however say that when Gibson passed the scene of the accident he was going very slowly; he himself says he "was simply crawling along," while the defendant says Gibson's speed was 4 or 5 miles an hour. Gibson further says that he did not see how the accident happened. I find it quite impossible to reconcile these statements with the case that the defendant had passed Gibson some way further back and that the cars were proceeding at a distance of 200 or 300 feet apart, at a normal speed, both on their right side of the road when the collision occurred. Were those the facts Mr. Gibson must have seen, if not the accident, at least the plaintiff lying in the road where he had fallen. Nor is his slowing down to 4 or 5 miles an hour in those circumstances explained. On the other hand the reduced speed would be explained if it was for the purpose of allowing the other car to pass. If this is the explanation then it follows that the collision took place either as the defendant's car had just passed the other, or as it was passing, or as it was on the point of passing. The plaintiff says he had passed the first car when the other car swerved and the collision took place. Which of the other two alternatives represents the facts is not in my opinion very important. It is clear both on the evidence and on the findings of the Subordinate Judge that the second car was very near, and so near, in my view of the evidence, that the defendant in trying to pass the first car without satisfying himself that the road was clear and that he could get by, was guilty of negligence which resulted in the collision.

The Subordinate Judge has come to his conclusion principally on the evidence of the witnesses other than Mr. Hall, whose statements he says he has not much referred to for he has been accused

Civil.  
1921.  
W. J. Rees  
John Young  
Buckland, J.

CIVIL.

1921.

W. J. Rees

John Young.

Buckland, &

of having instigated the plaintiff in bringing the suit. He does not say that he has any reason for not believing Mr. Hall and though his disregard of that gentleman's evidence emphasises his conviction of the truth of the plaintiff's evidence. I think he has erred on the side of excessive caution in not taking more into account what Mr. Hall said about the occurrence. Mr. Hall appears at the time to have expressed an opinion adverse to the defendant, but that is not unnatural if his evidence is true. Beyond that there is nothing in the evidence to justify the accusation to which the Subordinate Judge refers, even if that is a justification. Mr. Hall, besides the parties, was the only person who saw the accident. It was a moonlight night and he was at a short distance away. Irrespective of the estimates of the distance given by witnesses, this is proved by the fact that after the collision the defendant pulled up about 20 feet off from where it occurred, spoke a few words to his wife and ran back to where the plaintiff was lying and found Mr. Hall already there attending to the plaintiff. Mr. Hall's statement as to the collision is that the cars passed him; then he says:—"immediately after the second car passed me it swerved to its right evidently with the intention of overtaking and passing the first car. . . . plaintiff was approaching . . . when he was about in a line with the first car the second car evidently seeing that the road was not clear attempted to get behind the first car again but as he was so near the first car that at the time of swerving to the right he could not get back to his left side of the road and did not give Mr. Young room to pass." This is an intelligible account of the occurrence corroborating the plaintiff and I see no reason for not accepting it. This account is also corroborated by the defendant's statement of damage done to his car. The Subordinate Judge has not accepted the statements of the defendant and of Mr. Gibson as to the defendant's car having gone ahead before reaching the place where Mr. Hall was standing. Not only is this finding supported by the evidence of Mr. Hall but the evidence generally supports the argument advanced on behalf of the respondent that it was on account of Mr. Hall being on the road that the defendant did not overtake and pass Mr. Gibson earlier, but waited till the cars were clear of Mr. Hall.

A great deal has been made on behalf of the appellant of the position in the road in which the plaintiff was found to be lying after the collision. It has been argued that as he lay practically on the centre line of the road the defendant's car must have been on its proper side or it would have run over him. I find it impossible to draw any inference from this. The colliding vehicles were

CIVIL.

1921.

W. J. Rees

John Young.

Buckland, J.

approaching each other at a speed aggregating between 30 and 40 miles an hour, the plaintiff must have been thrown violently from his machine, contact with the car projected him in another direction. How is it possible to say after he had been thus thrown about that the place where he came to rest gives any precise indication of his position before he was subjected to these forces?

Though it has not been contended on appeal, and the point has very properly been abandoned, that the plaintiff was under the influence of alcoholic stimulant on the occasion in question, I wish to say a word with regard to the matter. The Subordinate Judge has found that the suggestion is without any basis. Not only do I agree with this finding but the suggestion ought never to have been put forward. It is in evidence that the very day after the accident the defendant made enquiries at Messrs. Kellner and Co's refreshment room at Asansol, yet he said nothing in his letter of the 10th June about the plaintiff being the worse for liquor. On the occasion of the accident a Dr. Tomb was present and attended to the plaintiff, but he was not called to support this suggestion. Yet the charge was made in the written statement filed on the 1st October 1917 and persisted in when the plaintiff was cross-examined, though the defendant and his advisers must have known that there was not a word of truth in it. Such charges, irresponsibly made, may do incalculable harm, and they should be finally laid to rest.

On the question of damages I can only say that I think that, considering the plaintiff's injuries, the pain and suffering, which he underwent, at one time his life was said to be in danger, his claim is extremely moderate, and that I know of no reason for reducing them even by the smallest coin of the realm.

I agree that this appeal should be dismissed with costs.

A. T. M.

*Appeal dismissed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.*

Civil

1921.

May, 20.

MOHINI MOHAN BANERJEE AND OTHERS

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL

AND OTHERS.\*

*Land acquisition—Compensation—Market value—Adaptability for possible use  
—Particular in way—Question of fact.*

The fairest and most favourable principle of compensation to the owners is to estimate the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it: *Premchand v Collector of Calcutta* (1) referred to.

The tribunals assessing compensation must take into account, not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events it might within a reasonable period be applied, just as the owner might do if he were bargaining with a purchaser in the market.

*Per Buckland J.* Whether or not the particular in way in which compensation is claimed that the land if so laid out could be disposed of to the best advantage to the owner is one appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case.

Appeals Nos. 251, 260 to 263 by the Claimants. Appeals Nos. 266, 280 to 283 by the Secretary of State.

Awards made by the Land Acquisition Judge.

The material facts appear from the judgment.

*Babus Charu Chandra Biswas and Bhujanga Bhusan Mukerjee* for the Appellants in Appeals Nos. 251, 260 to 263 and for the Respondents in Appeals Nos. 266, 280 to 283.

*Babus Ram Charan Mitra and Surendra Nath Guha* for the Respondents in Appeals Nos. 251, 260 to 263 and for the Appellants in Appeals Nos. 266, 280 to 283.

The judgments of the Court were as follows :

**Mookerjee, J.**—These ten appeals are directed against five awards made by the Land Acquisition Judge of Howrah in five references under section 18 of the Land Acquisition Act, 1894. The

May, 20.

\*Appeals from Original Decrees Nos. 251, 260-263, 266, 280 to 283 of 1919 against the decrees of B. M. Veitch Esq, Additional District Judge of Howrah, dated the 23rd June, 1919.

(1) (1876) I. L. R. 2 Calc 103.

Collector made his award in each case on the basis of the condition of the land at the time of the declaration. He adopted a three-fold classification, namely, homestead land at Rs. 400 per bigha, garden land at Rs. 100 per bigha and tank at Rs. 40 per bigha. The claimants applied in each case for a reference to the Court under sub-section (1) of section 18 and formulated the ground of their objection to the award of the Collector in these terms: "The land acquired is located just by the side of a brick-field; it could have been a brick-field in future and the value of the land should consequently be assessed at not less than Rs. 1,500 per bigha". Thus the substantial question for consideration on the reference was, whether the land should be valued on the basis of its actual condition at the time of the declaration or whether its special adaptability for possible use as a brick-field should be deemed a relevant element in the determination of its market value. The District Judge gave effect to the contention of the claimants that as the lands adjoined brick-fields and might at any time have been converted into brick-field lands, their special adaptability for the purpose was a material factor in the assessment of their market value. But as the situation and condition of the lands would render necessary an appreciable expenditure of money to convert them for use as brick-fields, he assessed their value at Rs. 800 per bigha. The Secretary of State for India in Council has appealed against the five awards on the ground that the District Judge should have valued the lands to their present disposition and should not have valued them on the conjectural ground that they were capable of conversion into brick-field lands or even as lands which might be absorbed into neighbouring brick-fields. The claimants, on the other hand, have preferred five appeals against the awards on the ground that although the District Judge had adopted the principle of special adaptability, the market value of the lands as assessed by him was inadequate, as he had allowed for cost of conversion on too liberal a basis. The ten appeals consequently re-open all the important questions in controversy before the District Judge.

As regards the appeals preferred by the Secretary of State for India in Council, it is manifest that the District Judge rightly declined to assess the market value of the lands solely on the basis of their actual disposition at the time of acquisition. The principle that the fairest and most favourable principle of compensation to the owners is to estimate the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it, was re-

CIVIL.

1921.

Mohini Mohan

v.

Secretary of State  
for India in Council.

Mookerjee, J.

CIVIL:

1921.

Mohini Mohan

Secretary of State  
for India in Council.

Mookerjee, Y.

garded as well-established by Garth, C. J. in the case of *Premchand Bural v. Collector of Calcutta* (1). The doctrine was applied by Sargent, C. J. in the case of *Collector of Poona v. Kashi Nath* (2) when he formulated the question for solution as to what would be the most lucrative and advantageous way in which the owner could dispose of it and what would be its market value if so laid out. The same view was emphasized in different terms in *Fink v. Secretary of State* (3): "The probable use of land in the most advantageous way, in accordance with or following, the use already made of neighbouring lands, leads to speculative advance in prices, and regard should be had to such advance. The utility of land is certainly an element for consideration in estimating its value, that is, the utility which may be calculated by a prudent businessman." The limitation involved in the concluding words of this passage is of fundamental importance, for as Jenkins, C. J. observed in *Kailas Chandra v. Secretary of State* (4), what has to be determined is the "market value of the land" which may be roughly described as the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land. Precisely the same test was indicated by Moulton, L. J. in *re Lucas and Chesterfield Gas and Waterboard* (5), when he observed that the owner is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him. This was approved by the Judicial Committee in *Cedar Rapids v. Latoste* (6), and is in accordance with the opinion previously expressed by Vaughan William, L. J., in *re Bwifla and Merthyr Dye Steam Collieries* (7), that in assessing compensation every circumstance which is in existence as a fact at the moment when the notice to treat is given is also the probable use which might be made of the property must be taken into consideration, although we cannot take into account a contingency which cannot be anticipated and cannot be measured. That there is room for divergence of opinion in the application of the principle to the facts of a concrete case, is illustrated by the course of events in the litigation last mentioned, where the House of Lords disagreed with the conclusion of the Court of Appeal which had reversed the decision of the primary Court; *Bwifla v. Pontypridd* (8).

(1) (1876) I. L. R. 2 Calc. 103.

(2) (1886) I. L. R. 10 Pom. 585 (589).

(3) (1907) I. L. R. 34 Calc. 599 (604).

(4) (1910) 17 C. L. J. 34.

(5) (1909) 1 K. B. 16.

(6) (1914) A. C. 569.

(7) (1902) 2 K. B. 135.

(8) (1903) App. Cas. 426.

The substance of the matter is that tribunals assessing compensation must take into account, not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events it might within a reasonable period be applied, just as an owner might do if he were bargaining with a purchaser in the market. The recognition of this potential value, as it has been called, may be found in a variety of cases; *R. v. Brown* (1) (Potential value of agricultural land for building purposes); *Ripley v. G. N. Ry. Co.* (2) (Contiguity of land to a reservoir making it suitable for building a mill); *Brown v. Commissioner for Railways* (3) (Future profitable working of mine); *Ossalinsky v. Corporation of Manchester* (4), Browne and Allen on Compensation 659 (Contiguity of land to a lake, making it specially adaptable for use as a reservoir); *Riddal v. New Castle Water Co.* (5) (Fitness of land for reservoir); *In re Cough and Aspatia* (6). (Fitness of land as base for water supply); *Sidney v. North Eastern Railway Co.* (7) (Adaptability of land for railway purposes); *Cedar Rapids Co. v. Lacoste* (8) (suitability for development of water power). The principle has also been applied where the land of the claimant, though not in itself adaptable for a reservoir, is so adaptable in conjunction with other adjacent lands belonging to other owners; *Mayor of Tynemouth v. Duke of New Castle* (9). Examples of the recognition of the doctrines of potential value and special adaptability may also be found in the cases of *Hughli Mills Co. v. Secretary of State* (10); *Rajendra Nath v. Secretary of State* (11); *In re Munji Khetsey* (12); *Government v. Dayal* (13); *In re Dhanjibhoy* (14); *In re Dorabji* (15); *In re Sorabji* (16); *Daya v. Assistant Collector of Surat* (17). The true rule was tersely stated by Lord Dunedin in pronouncing the opinion of the Judicial Committee in two recent cases. In *Cedar Rapids Co. v. Lacoste* (8), he formulated the proposition that the

CIVIL.

1921.

Mobini Mohan

Secretary of State  
for India in Council.

Mookerjee, J.

(1) (1867) L. R. 2 Q. B. 630; 36 L. J. Q. B. 322.

(2) (1875) L. R. 10 Ch. App. 435. (3) (1890) 15 App. Cas. 240.

(4) (1883) 2 Hudson on Compensation 1546.

(5) (1879) Browne and Allen on compensation 678.

(6) (1903) 1 K. B. 574; (1904) 1 K. B. 417.

(7) (1914) 3 K. B. 629. (8) (1914) App. Cas. 569.

(9) (1903) 89 L. T. 557; 19 T. L. R. 630.

(10) (1903) 12 C. L. J. 489.

(11) (1904) 1 L. R. 32 Calc. 343 (348).

(12) (1890) 1 L. R. 15 Bom. 279. (13) (1906) 9 Bom. L. R. 99.

(14) (1907) 10 Bom. L. R. 701. (15) (1907) 10 Bom. L. R. 675.

(16) (1908) 10 Bom. L. R. 696.

(17) (1913) 1 L. R. 38 Bom. 37.

## CIVIL.

1921.

Mohini Mohan  
v.  
Secretary of State  
for India in Council,  
Mookerjee, J.

value to be paid for is the value to the owner as it exists at the date of the taking; such value consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. In *Odum v. City of Vancouver* (1), he added the necessary corollary that while all opportunity of employment for a certain purpose in regard to the position of the land to be acquired is to be taken into account, there must come a point where the opportunity becomes so remote as to be negligible. This brings into clear relief the fundamental importance of the test that the operative effect of special adaptability or future utility, (expressions which have sometimes been criticised, not wholly without reason) must be estimated, not by idle speculation and unpractical imagination, but by prudent business considerations, such as would weigh with an intending purchaser at the imaginary market which would have ruled, had the land been exposed for sale when it was subjected to compulsory acquisition. Let us now examine the circumstances of the case before us in view of these principles.

It is an admitted fact that the lands acquired are at a short distance from the Bally canal which has numerous brick-fields along both its banks. Three of these brick-fields were owned at the time of the declaration by Ghose Kumar and Bull. These brick-fields adjoined one another and the acquired lands were cut off from direct access to the canal by their interposition. It appears from the evidence of the superintendent of the East Indian Railway brick-fields that bricks are made either from natural clay or from silt deposit. There is no evidence to show that there was such a depth of natural clay on the acquired lands that they could have worked as brick-fields for any length of time. Consequently, it may be assumed that the acquired lands could not be profitably used as independent brick-fields without deposit of silt. To obtain the requisite deposit of silt, a regular water supply would be necessary and as the acquired lands were cut off from the canal by intervening brick-fields, they could only have been of value for brick-field purposes if they should be acquired for and included in the neighbouring brick-fields. The claimants must accordingly show, in order to establish their proposition that the lands should have been valued on a brick-field basis, that there was reasonable probability that the lands would, but for their acquisition, have been included in those brick-fields. This assertion is not based on a mere hypothesis that as business flourished in the adjoining brick-fields, their

(1) (1915) 35 L. J. P. C. 95.



owners might, in the normal course of events seek for room for expansion. The claimants have actually proved that plots of land have from time to time been added to and included in at least one adjoining brick-field. They have also proved by reliable evidence that Kumar and Bull had negotiated with them for purchase or lease of some of these lands with a view to their incorporation in their existing brick-fields. No doubt, as pointed out by Batchelor J. in *Government of Bombay v. Marwanji* (1) too much importance must not be attached to evidence of offers in ascertaining the market value of land; but the position is different where, as here, the question is, whether there is a market at all for a tract of land for use for a specified purpose. In the present instance, there is no room for controversy that there is trustworthy evidence to show that if the acquired lands had been thrown into the market, adjoining brick-field owners would in all probability have come forward to purchase them or to take leases of them for inclusion in their brick-fields. The District Judge has thus rightly concluded that there was a reasonable probability that the lands might have been taken up by the adjoining owners for the extension of their brick-fields and that this possibility must be taken into consideration in calculating the amount to be awarded as compensation upon compulsory acquisition. The chief ground urged in support of the appeals preferred by the Secretary of State cannot consequently be sustained.

As regards the appeals preferred by the claimants the point for consideration is whether the rate fixed by the lower Court is adequate. The District Judge was plainly right when he held that documents filed on behalf of the Secretary of State were not of much assistance. They relate to transactions regarding lands at some distance from the lands acquired, and even if they relate to leases or purchases of lands contiguous to brick-fields, they are not in respect of transfer of land to brick-field owners for brick-field purposes. On the other hand, the claimants have adduced documentary evidence (conveyances, leases and land acquisition awards) in respect of lands actually in use as brick-fields, these indicate a rate which varies from a minimum of Rs. 1,200 per bigha to a maximum of Rs. 2,250 per bigha, the majority of transactions show that the rate varies from Rs. 1,440 to Rs. 1,650 per bigha. From an analysis of the relevant evidence, the District Judge had thus correctly held that Rs. 1,600 per bigha may fairly be taken as the rate for fully prepared brick-fields. He has then allowed a reduction of 50 per cent, because the lands acquired would have to be

(1) (1908) 10 Bom. L. R. 907 (919).

CIVIL.

1921.

Mohini Mohan

Secretary of State  
for India in Council.

Mookerjee, J.

CIVIL.

1921.

Mohini Mohan

Secretary of State  
for India in Council

Mookerjee, J.

converted into lands fit for use as brick-fields at a considerable outlay. This reduction however is not supported by the evidence on the record. The method of brick manufacture in this country as described in standard treatises (such as the paper by Major Falconnet R. E. in Vol. III of the professional papers on Indian Engineering published by the Government), also does not lend any support to the view that the cost of conversion of ordinary land into land fit for use as brick-fields amounts to one-half of the value of the land. On the other hand, such evidence as there is on the record shows that the reduction allowed by the Court below is excessive. The District Judge has correctly found that the leases on the record prove that prepared brick-field lands fetch a rent of Rs. 80 per bigha. The District Judge has also accepted the statement of Mohini Mohan Banerjee, one of the claimants, as to the rent paid to him by Mr. Bull for a plot of 15 cottas incorporated in a brick-field but he has inaccurately stated this to be Rs. 50 per bigha instead of Rs. 50 as the rent fixed as a lump sum. If this statement be accepted the rent for unprepared land works out at Rs. 200 for three bighas as against Rs. 240 for three bighas of prepared land. This gives the proportion by which the value should be reduced, namely, 6 to 5. The conclusion follows that if the rate for prepared brick-fields is Rs. 1,600 as found by the District Judge, the rate for unprepared land should be approximately Rs. 1,333. We accordingly direct that the lands acquired be valued at Rs. 1,300 instead of Rs. 800 per bigha.

The result is that appeals Nos. 266, 280, 281, 282 and 283 filed by the Secretary of State must be dismissed with costs. The hearing fee in each of these cases is assessed at two gold mohurs. Appeals Nos. 251, 260, 261, 262 and 263 preferred by the claimants are allowed with costs. The land in each case will be valued at Rs. 1,300 instead of Rs. 800 per bigha. The hearing fee in each of these appeals also is assessed at two gold mohurs. The order for proportionate costs made by the lower Court will stand but the amounts will be modified on the basis of the sums awarded in this Court.

**Buckland, J.**—The principle adopted by the District Judge in assessing the compensation payable, by enquiring what is the market value of the land when laid out in the most lucrative and advantageous way in which the owner could dispose of it, is very well established and he has correctly applied it. Whether or not the particular in way in which it is claimed that the land if so laid out could be disposed of to the best advantage to the owner is one

appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case. In the case before us there can be no question that the land which has been held to be suitable for a brick-field, would fetch a higher price, if sold for that purpose to the owner of an adjacent brick-field than if sold for any other purpose. The District Judge has disregarded the evidence of leases of other lands adduced by the Secretary of State and done so rightly on two grounds:—(1) the lands are not contiguous to those in question and (2) they are not leases of land to brick-field owners for the purpose of making bricks.

In assessing compensation the District Judge has erred in deducting 50 per cent. as the cost of converting the land for the purposes of a brick-field.

In addition to the evidence referred to by my learned brother Mr. Justice Mookerjee there is the statement of Sarada Prosad Kumar that it took him 6 or 8 months to convert land into a brick-field. Applying this to a computation of the value of the land on a lease-hold basis the reduction on account of conversion for this particular purpose, is comparatively trifling. Taking this in conjunction with the reasons given by my learned brother Mr. Justice Mookerjee I agree with him as to the rate at which compensation should be paid and I concur in the order made.

ALFRED M.

*Appeals Nos. 266, 280-83 dismissed :*

SEAN M.

*Appeals Nos. 251, 260-63 allowed.*

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CIVIL.

1921.

Mohini Mohan

Secretary of State  
for India in Council

Buckland, J.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr.  
Justice Newbould.*

PARESH NATH PAL CHOUDHURY AND OTHERS.

ISMAIL SARDAR AND OTHERS.\*

CIVIL.

1921.

June, 13.

*Limitation—Rent decree—Acknowledgment—Bengal Tenancy Act (VIII of 1885)*

*Secs. 184, 185, Sch III. Art. 6—Limitation Act (IX of 1908) Sec. 19.*

\*Appeal from Appellate Order No. 355 of 1920, against the order of A. L. Mukherjee Esq. District Judge of Nadia, dated the 2nd July, 1920, reversing that of Babu Bepin Behary Mukherjee, Munsiff, 1st Court, at Krishnagar, dated the 7th August, 1919.

CIVIL.

1921.

Pareesh

v.  
Ismail.

Section 19 of the Limitation Act is applicable to a decree for rent valued less than Rs. 500 and hence an acknowledgment of liability made by a judgment-debtor in respect of the decree-holder's right to execute the decree, gives the decree-holder a fresh starting point for counting the period of limitation prescribed by article 6, schedule III of the Bengal Tenancy Act : *Harikar Lal v. Gunderar Pershad* (1) referred to.

Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been made, that the instalment for *Four* remained unpaid but as it had not become due, the decree-holder could not proceed with the execution :

*Held*, that was a sufficient acknowledgment within the meaning of section 19 of the Limitation Act.

Appeal by the Decree-holders:

Application for execution of rent decree valued less than Rs. 500.

The material facts appear from the judgment.

*Babu Rupendra Kumar Mitra* for the Appellants.

*Babus Satindra Nath Mookerjee* and *Satis Chunder Munshi* for the Respondents.

The judgment of the Court was as follows :

The question involved in the appeal is whether the application for execution of a decree is barred by limitation.

The decree was one for rent and the amount for which it was passed was less than Rs. 500. It was dated the 27th January 1916.

The present application for execution was made on the 28th March 1919, i.e. more than 3 years from the date of the decree. The decree-holder, however, relied upon certain acknowledgments of liability within three years of the date of the decree, and the Court of first instance held that such acknowledgments saved limitation.

On appeal the learned District Judge held that section 19 of the Limitation Act was inapplicable to the case as it was a decree for rent which is governed by the special limitation prescribed by article 6, schedule III of the Bengal Tenancy Act.

There is no doubt that under article 6 schedule III of the Bengal Tenancy Act, the period of limitation is three years from the date of the decree, and section 184 of that Act lays down that any application made after the period of limitation prescribed in schedule III annexed to the Act shall be dismissed although limitation has not

June, 13,

been pleaded. Section 185 sub-section (1) lays down that sections 7, 8 and 9 of the Limitation Act, 1877 shall not apply to the suits and applications mentioned in section 184. Sub-section (2) however, provides that subject to the provisions of this Chapter, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in the last foregoing section. Under that sub-section, therefore, it appears that section 19 of the Limitation Act would apply to a decree for rent.

CIVIL

1931.

Paresh

v.

Ismail.

Article 6, schedule III of the Bengal Tenancy Act provides that when the judgment-debtor has by fraud or force prevented the execution of the decree, the period of limitation shall be governed by the provisions of the Indian Limitation Act, 1877, but it does not follow that in cases where there is force or fraud the general provisions of the Indian Limitation Act (other than those mentioned in the section 185 (1) of the Bengal Tenancy Act), will not apply. The article merely says that the *period* of limitation shall be governed by the provisions of the Indian Limitation Act, 1877. The question appears to have been considered in the case of *Harihar Lal v. Gunendra Pershad* (1). The learned Judges held that an acknowledgment of liability, under section 19 of the Limitation Act made by a judgment-debtor, in respect of the decree-holder's right to execute a rent decree gives the decree-holder a fresh starting point for counting the period of limitation prescribed by article 6 of schedule III of the Bengal Tenancy Act.

It is contended on behalf of the appellant that, if the decree-holder is allowed a fresh starting point for limitation for the execution of a rent decree from the date of acknowledgment under section 19 of the Indian Limitation Act, it would affect or alter the period of limitation prescribed by article 6 of the Bengal Tenancy Act.

As pointed out by the learned Judges in the case cited above, "the answer to this would seem to be that the acknowledgment under section 19 does not affect or alter the period of limitation so prescribed, though it may seem practically to do so, but only gives the decree-holder a fresh starting point for counting the period prescribed by article 6, schedule III of the Bengal Tenancy Act which the judgment-debtor has himself given him by petitions containing the acknowledgments of his debt".

(1) (1905) 9 C. W. N. 1025; 1 C. L. J. 617

CIVIL.

1921.

Pareesh

v.

Ismail.

We are accordingly of opinion that section 19 of the Limitation Act applies to such a case.

It is contended on behalf of the respondent that there was no acknowledgment of liability within the meaning of section 19 of the Limitation Act.

It appears, however, that the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that the instalment for *Pous* remained unpaid but as it had not become due, the decree-holder could not proceed with the execution. That was a sufficient acknowledgment within the meaning of the section.

It is contended that the admission should be confined to the actual amount payable for the *Pous* instalment. But there was an acknowledgment of liability under the decree and that, we think, is sufficient for the purpose of the section.

The result is that the order of the lower appellate Court is set aside and that of the Court of first instance restored with costs here and of the lower appellate Court, the costs in this Court being assessed at one gold mohur.

The execution of the decree will be proceeded with.

A. T. M.

*Appeal allowed*

## CRIMINAL REVISION.

*Before Mr. Justice Newbould and Mr. Justice Suhrawardy.*

HEMANTA KUMAR SEN

v.

KING-EMPEROR.\*

CRIMINAL.

1921.

July, 15.

*Place of public resort—Calcutta Suburban Police Act (IX B. C. of 1866), Sec. 18—  
Stall in public road on which soda water is sold.*

\* Criminal Revision No. 516 of 1921, against the order of Srigopal Bhattnagarjee Esq., Additional District Magistrate of 24-Parganas, dated the 19th April, 1921, affirming that of Moulvi Khondkar Ali Taher, Sub-Divisional Magistrate of Alipore, dated the 17th February, 1921.

A stall on which soda water is sold not for consumption on the premises, is not a place of public resort within the meaning of section 18 of the Calcutta Suburban Police Act. Hence a person commits no offence in selling soda water and other aerated water and non-intoxicating beverages on a stall in a public road, without a license for the sale thereof.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused was convicted under section 18 of the Calcutta Suburban Police Act and sentenced to pay a fine of Rs. 5, in default to suffer simple imprisonment for 2 days, for keeping a shop at Kalighat Road and selling aerated waters and cold drinks without a Police license in contravention of section 18 of Act II B. C. of 1866.

*Babu Bir Bhusan Dutt* for the Petitioner.

*No one* appeared for the Opposite Party.

The judgment of the Court was as follows :

The petitioner has been convicted under section 18 of the Calcutta Suburban Police Act II (B.C.) of 1866 and sentenced to pay a fine of Rs 5. The petitioner has a stall on the Kalighat road wherefrom he sells soda water and other aerated water and non-intoxicating beverages. The only question that arises in this Rule is whether that place is a "place of public resort and entertainment" within the meaning of section 18 of Act II (B. C.) of 1866. In section 51 of the Act, "a place of public entertainment" is defined as "a place whether enclosed or open to which the public are admitted and where any kind of food, drink or drug is supplied for consumption on the premises for the profit or gain of any person owning or having an interest in or managing such place and shall include a refreshment-room, eating-house, coffee-house, tea-shop, liquor-house, boarding-house, lodging-house, hotel, restaurant, tavern, wine-shop, beer-shop, spirit-shop, arruk-shop, toddy-shop, gunja-shop, bhang-shop and opium-shop." The shop kept by the petitioner does not come within this definition because there is no place to which the public are admitted nor are the drinks supplied to the public, supplied to them for consumption on the premises. We do not think that, if it is not a place of public entertainment, it can be held to be a place of public resort within the meaning of section 18 of the Act. The words used in that section are "or other place of public resort and entertainment" and they follow the words "keeps any coffee-house, boarding-house, eating-house, lodging-house." Applying the principle of *Ejusdem generis* to these words, we hold

CRIMINAL.

1921.

Hemanta

King-Emperor.

July 15.

CRIMINAL.  
1921.  
Hemanta  
King-Emperor

that a stall on which soda water is sold not for consumption on the premises cannot be held to be a place of public resort within the meaning of section 18 of Act II (B. C.) of 1866. Taking this view, it follows that the petitioner committed no offence in selling these articles without a license for the sale thereof. We accordingly make this Rule absolute, set aside the conviction of the petitioner and direct that the fine, if paid, be refunded.

A. T. M.

*Rule made absolute.*

*Before Mr. Justice Newbould and Mr. Justice Suhrawardy.*

CRIMINAL.

KALI CHARAN KUNDU

1921.

v,

July, 30, 21.

KING-EMPEROR.\*

*Jurisdiction—Criminal Procedure Code (Act V of 1898), Sec. 531—Objection taken at an early stage—Prejudice—Misappropriation, how provable.*

Where the petitioner was convicted under section 408 of the Indian Penal Code for an offence committed outside the territorial jurisdiction of the trying Court:

*Held*, that as the error did not occasion a failure of justice, the defect was cured under section 531 of the Code of Criminal Procedure. The fact that the objection of jurisdiction was taken at a comparatively early stage of the proceeding, was not conclusive proof that the accused was prejudiced by the irregularity.

The fact of misappropriation can be proved as well by circumstantial evidence as by direct evidence.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused was convicted under section 408 of the Indian Penal Code and sentenced to undergo 6 months' rigorous imprisonment. The offence was committed in Katwa in the district of Burdwan, but the trial was held in the sub-division of Ranaghat, in the district of Nadia. An objection was raised as to the trial at the early stage of the proceeding, but it was overruled.

\* Criminal Revision No. 45 of 1921, against the order of A. L. Mukerjee Esq., Sessions Judge of Nadia, dated the 20th May, 1921, affirming that of Babu Kenti Chandra Mukherjee, Sub Divisional Magistrate of Ranaghat, dated the 29th April, 1921.



*Babus Dasarathi Sanyal and Khitish Chander Chuckerbutty* for the Petitioner.

*No one* appeared for the Opposite Party.

The judgment of the Court was as follows :

This Rule is directed against the conviction of the petitioner under section 408 Indian Penal Code. The first point taken is that the trying Magistrate had no jurisdiction to try the case as the offence of which the petitioner was convicted was committed at Katwa in the district of Burdwan and the trial was held at the subdivision of Ranaghat in the district of Nadia. The learned Sessions Judge on appeal has held that the offence was committed outside the trying Magistrate's jurisdiction but that the defect was cured by the provisions of section 531 Code of Criminal Procedure. We do not think it necessary to discuss the point whether the offence was committed at Ranaghat or at Katwa because we are of opinion that the Sessions Judge was right in applying the provisions of section 531, Code of Criminal Procedure and holding that the error had not, in fact, occasioned a failure of Justice. Our attention has been drawn to the explanation to section 537 Code of Criminal Procedure which says "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could or should have been raised at an earlier stage in the proceedings." In the present case, the petitioner did object to the trial at a comparatively early stage of the proceedings. This, we think, would go a long way to show that he had been prejudiced by the irregularity but we hold that it does not go all the way, or, in other words, the fact that such an objection was taken is not conclusive proof that the accused has been prejudiced by the irregularity. The learned Sessions Judge has held for reasons given that there was no such prejudice. In the affidavit which forms the basis of the petition on which this Rule was granted, there is no statement that the accused was prejudiced. In the first ground, there is one allegation that there was prejudice ; but no ground was taken that the decision of the learned Sessions Judge to the contrary was wrong. On the materials before us, we cannot say that there has been, in fact, a failure of justice and we must, therefore, apply the provisions of section 531 Code of Criminal Procedure and hold that the conviction is not bad on the ground that the offence was committed outside the territorial jurisdiction of the trying Magistrate.

CRIMINAL.

1921.

Kali Charan

v.

King-Emperor.

July, 21.

## CRIMINAL.

1921

Kali Charan

v.

King-Emperor.

As regards the facts, we see no reason for dissenting from the findings of the lower Courts. It is contended that there is no proof that 50 tins of kerosene oil were actually misappropriated. There is no direct evidence to this effect. It has not been proved what the stock was in the petitioner's charge at any time. But from the facts that had been proved it was open to the trying Magistrate to come to a finding that there was such a misappropriation and this is what he has found. His finding is "The accused has failed to account for these 50 tins of kerosene oil and is therefore to be construed to have misappropriated this portion of the stock." The fact that the 50 tins have been misappropriated could be proved as well by circumstantial evidence as by direct evidence and the finding is a finding that the fact has been proved by circumstantial evidence.

Another objection taken is that in the petition of complaint it is alleged that these 50 tins of kerosene oil were misappropriated on various dates. If that were so, there might be misjoinder in the charges. But, although this was alleged in the petition of complaint, that allegation was not made in the sworn statement of the complainant when he was examined at the time the complaint was lodged, and there is no evidence whatever on the record to suggest that the misappropriation was committed on more than one occasion. On the facts found, single offence has been committed in respect of these 50 tins and, therefore, there has been no misjoinder.

It is also urged that the offence committed by the accused was one under section 477 A Indian Penal Code which is triable only by a Court of Sessions. It may be that the petitioner did also commit this more serious offence. But this is no reason why we should hold that he is not liable to a conviction by a Magistrate of an offence under section 408 Indian Penal Code which has been proved to have been committed.

The Rule is discharged. The petitioner must surrender to his bail and serve out the unexpired portion of his sentence.

A. T. M.

*Rule discharged.*

## APPELLATE CRIMINAL

Before Mr. Justice Newbould and Mr. Justice Suhrawardy.

SUPERINTENDENT AND REMEMBRANCER OF  
LEGAL AFFAIRS, BENGAL.

CRIMINAL

1921.

July, 21.

J. S. MULL.\*

*License, refusal of—Licensed Ware-house and Fire-brigade Act (I B. C. of 1893), sections 7, 15—Order to be passed by whom—Order passed by Vice-Chairman, if legal—Delegation of power by Chairman—Bengal Municipal Act (III B. C. of 1884), section 45—Application not disposed of within thirty days, effect of.*

Refusal of an application for license to use any building or place as a warehouse should be by an order in writing under the hand of the Chairman of the Commissioner. Where such order was passed by the Vice-Chairman :

*Held*, that there was no refusal of the application under section 15 of the Licensed Warehouse and Fire-brigade Act.

A Chairman cannot by virtue of section 45 of the Bengal Municipal Act, delegate to the Vice-Chairman his powers under the Licensed Warehouse and Fire-brigade Act.

Under section 7 of the Licensed Warehouse and Fire-brigade Act, if the application is not disposed of within thirty days from the date of its being received by the Chairman, the applicant is exempted from liability so long as the application is not finally refused.

Appeal by the Government under section 417 of the Code of Criminal Procedure.

The material facts appear from the judgment.

*Mr. Orr* for the Appellant.

*Babus Dasarathi Sanyal* and *Gour Mohun Dutt* for the Opposite party.

The judgment of the Court was as follows :

This is an appeal against an acquittal. The respondent J. S. Mull was charged with having committed an offence punishable under section 15 of the Licensed Warehouse and Fire-brigade Act, 1893, which provides a penalty for any person who uses any building or place as a warehouse in respect of which a license has been refused. A preliminary objection has been taken which is fatal to this appeal. The Act provides that the refusal of an application for

July, 21.

\* Government Appeal No. 3 of 1921, against the order of the Deputy Magistrate of Howrah, dated the 31st March, 1921.

**CRIMINAL.**

1921.

Superintendent and  
Remembrancer of  
Legal Affairs,  
Bengal.

J. S. Mull.

license shall, under section 7, be by an order in writing under the hand of the Chairman of the Commissioners. In the present case, the order of refusal was passed by the Vice-Chairman. Although under section 45 of the Bengal Municipal Act III (B.C.) of 1884, the Chairman may delegate his duties or powers to the Vice-Chairman, the powers he can so delegate are the powers as defined by that Act. He cannot by virtue of that section delegate to the Vice-Chairman his powers under the Licensed Warehouse and Fire-brigade Act. That Act provides in section 9 for the delegation of the powers of the Chairman to a Special Committee but makes no provision for delegation to the Vice-Chairman. We must consequently hold that the prosecution was bound to fail as there was no refusal of the application for license in accordance with this Act.

We are requested by the learned Deputy Legal Remembrancer to point out an error in the judgment of the trying Magistrate. He has held that section 7 of the Fire-brigade Act requires that any application for license shall be disposed of within thirty days from the date of its being received by the Chairman and, if not disposed of within that period, the applicant shall not be liable. This, as stated, is wrong, because, if the application is not disposed of within thirty days the applicant is only exempted from liability so long as the application is not finally refused.

The appeal is dismissed.

A. T. M.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Sir John Woodroffe, Knight, Judge, and Mr Justice Cuming.*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

ANNADA MOHAN ROY AND OTHERS.\*

*Possession, suit for—Bengal Tenancy Act (VIII of 1885), sections 95 (a), 97—'Estate'—Reformation—Accretion—Power of Manager of Court of Wards to sue—Suit barred by special law of limitation—Party, if entitled to deduct two months for service of notice under section 80 of the Code of Civil Procedure (Act V of 1908)—Limitation, plea of—Limitation, when to be decided against a party—Book, containing history of a district, admissibility of—Presumption of continuity, applicability of—Rennell's map—Presumption of accuracy—Evidence Act (I of 1872), section 83.*

When the Bengal Tenancy Act gives the District Judge the power to direct that an estate be managed by the Court of Wards, in such case that body has the same powers as it has in regard to other estates directly coming within the provisions of the Court of Wards Act. In the latter case, there would be a power of suit in the Court of Wards.

Section 97 of the Bengal Tenancy Act gives the Court of Wards power to sue in the case of an estate which comes to it under the provisions of section 95 (a) of the Act.

The word 'estate' in section 95 (a) of the Bengal Tenancy Act, means all that the holder is entitled to by way of reformation or accretion. The lands which were handed over to the Manager of the Court of Wards and the lands which were subsequently reformed, are the whole estate.

In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under section 80 of the Civil Procedure Code.

It is necessary that limitation should be pleaded in all cases. But particularly this is so where the bar is alleged under some special law.

The general rule is, that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact.

Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence.

If limitation is urged as a bar, the facts on which it is barred, must be proved after an issue has been framed.

The mere fact that a book containing the history of a certain district was not referred to in the lower Court, may not be, of itself, a good objection. If, however, the book was used to establish the existence of facts which the party had no

\* Appeal from Original Decree No. 37 of 1919, against the decree of Babu Krishna Kumar Sen, Additional Subordinate Judge of Backerganj, dated the 18th November, 1918.

CIVIL.

1921.

May, 23.  
June, 17.

## CIVIL.

1921.

Secretary of State  
for India in Council.

v.

Annada.

opportunity of meeting and which he desired to rebut, the admission of the book in the appellate Court might involve a remand.

The presumption of continuity varies with the circumstances of the case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known in the absence of evidence to the contrary.

Rentell's map was made some 22 years or so, before the decennial settlement on which the permanent settlement proceeded. If it be referred to as evidence, there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence.

Appeal by the Defendant.

Suit for possession.

The material facts appear from the judgment.

*Mr. Gibbons (Advocate General), Babu Ram Charan Mitra, Dr. Dwarka Nath Mitter and Babu Monindra Nath Banerjee* for the Appellant.

*Mr. S. R. Das, Babus Surendra Chandra Sen and Surendra Nath Guha* for the Respondents.

C. A. V.

May, 23.

The judgment of the Court was as follows :

The plaintiffs Nos. 1 to 34 and the plaintiff No. 35 are proprietors of the permanently settled revenue paying estates Nos. 1763 and 1764 respectively on the revenue roll of the Bakarganj Collectorate. The plaintiffs Nos. 1 to 34 are also lessees of the estate No. 1764 under a patta from the thirty-fifth plaintiff. The two estates together constitute the zamindari of Pargana Dakhin Sahabazpur, Estate No. 1763 and the leasehold are in the management of a Manager under the Court of Wards and this suit is brought by him on behalf of the plaintiffs Nos. 1 to 34 and by the plaintiff No. 35. The subject matter of this suit are two island churs at present known by the names of Chur Botham and Chur Harikishore and certain lands described in schedule A to the plaint. The question is, are these lands reformations of the plaintiff's permanently settled estates, as the plaintiffs allege or are the two churs new formations in a navigable river and the other lands accretions to the permanently settled estate assessable to additional revenue. The land settled, was, as we have said, Pargana Dakhin Sahabazpur. As regards the northern and the southern boundaries of the Pargana there is no dispute. As regards the west the plaintiffs say that the Pargana was bordered by the Betua River. The respondent says that it was bounded by other settled estates.

The question in dispute is where is the eastern boundary of this permanently settled estate. It is undisputed that the eastern boundary of the settled Pargana was the western bank of the river Sahabazpur. The question is whether the western bank of Sahabazpur river as it was at the time of permanent settlement and as depicted in Rennell's map forms the eastern boundary of the pargana. It is both parties' case that the western bank of the Sahabazpur river is the eastern boundary and the point to be decided is where was that western bank at the time of the permanent settlement. We have to decide whether the lands in suit fall within the boundaries of the estate in respect of which the plaintiffs have been paying revenue to Government.

It is necessary particularly with reference to the issue of *res judicata* to give a short resume of the previous history on the subject, and with reference to the objection that there has been an abatement or remission of the original revenue consequent on the reduction of the area, to give a short previous history of the pargana.

In the year 1847, two churs named Bhasan Tazumaddi and Dampier formed in the Sahabazpur river. In the year 1880-81 there was a Deara Survey and the Deara Superintendent of Surveys took possession of these two islands on behalf of Government. He disallowed the respondents' contention that these churs were reformations on the sites of their diluviated permanently settled lands and that the sites were dry lands according to Rennell's map of 1764-73 at the time of the permanent settlement. He relied on Kelso's map which was prepared in 1847-48 and held that the churs were new formations on the bed of a navigable river and belonged to Government. The respondents who objected to the decision claimed them as being within their eastern boundary. The decision of the Deara Superintendent was in 1883 and was, as we have said, based upon Kelso's map which he held showed that the lands in question lay outside the boundary of the permanently settled estate. An appeal was made to the Commissioner by the respondents and the Commissioner in his order of the 26th March 1884 after stating that Rennell's map showed that shortly before the permanent Settlement where the lands had reformed was part of Sahabazpur and that subsequent to the permanent settlement the Pargana suffered severely from diluvion all along its eastern face as was shown by a comparison of Kelso's and Tasin's map with that of Rennell, expressed his opinion that the lands were clearly reformations of the appellant's permanently settled estate and

CIVIL.

1921.

Secretary of State  
for India in Council.

Annada.

Civil.

1893.

Secretary of State  
for India in Council.

Annada.

reversed the order of the Deana Superintendent assessing them with revenue and ordered the islands to be released. From that decision of the Commissioner, the Government appealed to the Board of Revenue and, in their grounds of appeal, amongst other matters, they alleged that Rennell's map was incorrect and contended that a comparison of Kelso's map with the locality showed that the chur was thrown up in a big navigable river and was not included within the pargana. The Board of Revenue rejected the appeal of the Government and referred them to their remedies by a civil suit. On the 6th of October 1893, a civil Suit (No. 76 of 1893) was filed by Government for declaration of title and possession of chur Dam-pier. It is to be observed that no civil proceedings were taken with respect to the other chur, namely, Bhasan Tazumaddi and accordingly the plaintiffs in this suit allege that the Government acquiesced in the decision of the Commissioner of revenue and the Board of Revenue in respect of that chur. That suit was subsequently transferred to another Court and re-numbered as No. 90 of 1895. The Secretary of State in his plaint in that suit alleged that estates Nos. 1763 and 1764 were owned by the defendants in the first para of the plaint mentioned and that together they constituted the pargana Dakhin Sahabazpur and that a wide channel an arm of the sea locally known as Dakhin Sahabazpur river lay to the east of the Pargana Dakhin Sahabazpur and formed the eastern boundary of that pargana. Then the plaint set forth the proceedings to which we have referred and alleged that the chur was formed in a wide navigable river and was not a reformation on the original site of any lands of pargana Dakhin Sahabazpur, that the map of Major Rennell did not represent the state of things existing at the time of the permanent settlement, that it was drawn on too small a scale to admit of any satisfactory comparison and that there were reasons for holding that it was not accurate. The plaintiff accordingly prayed for a decree declaring that the lands in dispute being an island formation in the bed of a big navigable river belonged to him and that the claim of the defendants that they were reformations in situ was without foundation. The respondents filed a written statement in which they alleged that the disputed chur having formed on the original site of diluviated lands permanently settled with the proprietors of pargana Dakhin Sahabazpur, the plaintiff had no right, title or interest in such newly formed lands. They contended that, though the map of Major Rennell was prepared some years before the permanent settlement, yet in the absence of evidence of change the position of the land and water



CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Annada

ought to have been presumed to continue. They alleged that this map had been acted upon by the Government in several instances and, on the basis of that map, the revenue authorities had released newly-formed lands to private parties and private parties had also in several instances obtained decrees against Government for newly formed lands in the civil Court on the basis of this map. They denied that it was inaccurate. Then, in para 11, a statement was made which is important upon the issue of abatement of revenue now sought to be raised. Para 11 of the written statement alleged that after the permanent settlement the river lying to the east of Pargana Dakhin Sahabazpur gradually encroached upon it and diluviated its land to the extent of nearly eight miles in breadth for which the present zamindars or their predecessors-in-interest obtained no reduction of revenue and, as the present chur was a reformation on the site of the diluviated lands, the plaintiff had no right thereto. This statement that there had been no reduction of revenue was not, we may here observe, contested in the suit, and no issue was raised with reference thereto. The suit was heard by the Subordinate Judge of Barisal who gave his judgment on the 12th of December 1895. A number of issues were raised of which the most important were the 4th and the 5th, namely, (4) "Has the land in dispute been formed in a large and navigable river or an arm of the sea existing at the time of the permanent settlement?" and (5) "Whether the land in dispute is a reformation on the original site of the defendants' pargana Dakhin Sahabazpur and whether it is an accretion to the same?"

We shall refer later when dealing with the issue of *res judicata* to the findings of the Subordinate Judge in that suit. The conclusion, however, to which he came was that Rennell's map should be followed and that the eastern boundary of the Pargana as it existed at the time of the permanent settlement was shown by that map. He found that the map could be relaid and that the correct starting point was the south west angle of Fort William. He, however, also found that a portion of chur Dampier fell beyond that line and was an accretion to the Pargana for which the defendants were liable to pay additional revenue. That portion is marked by the letters A, B, C on the map. He accordingly dismissed the suit except, as regards the small triangular portion to which we have referred which was declared to lie outside the boundary line of the Pargana and was, therefore, liable to assessment. In the present suit, the same question has come up again with respect to the property now in dispute and the two issues which have been framed

**CIVIL****1921.**Secretary of State  
for India in Council.**Annada.**

are (5) "Are the plaintiffs entitled to all lands and churs to the west of the eastern boundary of Pargana Dakhin Sahabazpur as shown in the map annexed to the decree in suit No. 90 of 1895?" and (6) "Is the defendant entitled to dispute the said eastern boundary?"

Touching the issue of abatement the following facts must be noted. From an early date the Salt Department occupied lands belonging to the zamindary. At first the Salt Department appear to have paid Rs. 12208 (sicca) for their use and occupation and the zamindars paid the full revenue of Rs. 57435-13-4. After that the sum was not paid but was called "suspended." That is it was deducted from the total revenue. The zamindars paid 44413-15-5 only. In other words a book transfer was made of the amount due to the zamindar as rent by the Salt Department. In 1838 the manufacture of salt was discontinued. The Government offered to give back the lands held by the Salt Department on the zamindars agreeing to pay in future the sum previously deducted from the revenue payable, in other words the revenue originally fixed. The respondents did not agree to go back to the old state of affairs alleging that the "suspension" of jama was allowed not only on account of rent but also in consideration of sundry cesses of which the zamindars had been deprived. They pointed out what appears to be the fact viz., that a large portion of the lands relinquished by the Salt Department had been resumed by Government and separately assessed. In exhibit K.K. Mr. H. Ricketts' (the Commissioner of Chittagong) letter, it is stated that some Salt Mokams had been wholly washed away. A survey of the lands was made in 1848 by Mr. Kelso to ascertain the extent and locality of the resumed lands, whether lands held by the Salt Department were in possession of the zamindars and to quote Mr. Ricketts' letter "to ascertain the extent of the zamindari which pays the reduced jama of 44413-15-5."

Mr. Ricketts points out that the Government had resumed lands of the area there stated—the aggregate area of resumptions actually exceeding the area of the estate held by the zamindars. He states that the assessment of the resumed lands was already Rs. 33,513 and would in a few years equal the sadar jama of the original estate. The jama then paid by the estate was stated to be Rs. 44,413 on 102095 acres culturable. This, he observes was a high jama for an estate settled in perpetuity, especially when it was considered that much of the land was held by talukdars under the zamindars at a very low rate. The Collector had proposed that the question of re-imposition of the suspended Rs. 13021 should be adjusted by composition on the terms mentioned in the letter which it is not

necessary to recapitulate. Mr. Ricketts however, states that these terms were not acceptable to the zamindars who represented that the jama then paid (Rs. 44413) was a heavy burden on the lands remaining to them and that to reimpose the suspended jama without restoring all the privileges they possessed previous to the introduction of the salt manufacture would be unjust. He points out that the zamindars could show that the Government had by means of 35 resumption suits separately resumed 151862 acres assessed at Rs. 33513, that portion of the land resumed was certainly the land held by the Salt Department, that some Salt Mokams had been destroyed by diluvion and that the land which then comprised their zamindari was not in extent and produce disproportionate to the jama already paid namely, Rs. 44413. On the whole, he concludes as follows: "Assuredly, the long array of resumptions would induce a bias in favour of the zamindars and I by no means feel so assured of our equitable right to reimpose the suspended jama as to recommend that the extreme measures of re-imposition and sale by Court of the estate for arrears should be resorted to." He recommended, therefore, as an alternative, that all intentions of reimposing the suspended Rs. 13021-13-11 should be abandoned. After this, on the 11th September 1850, the Revenue Secretary to the Government of Bengal wrote to the Sadar Board of Revenue stating that the plea of the zamindars against reimposition of the sum deducted on account of the salt manufacture had been proved to a great extent to the satisfaction of Mr. Ricketts and that "taking into consideration the great extent of the resumptions that have been made in this estate and the vast increase of actual jama derived therefrom, His Honour is pleased in accordance with the recommendation of Mr. Ricketts, to authorize the abandonment of the suspended amount and the proposed reduction in the Sadar jama of the estate." We may here observe that it would seem that from the year 1802, if not from 1793, the actual amount of revenue which had been paid by the zamindars was the sum of Rs. 44413-15-5 pies which represents the sadar jama as originally fixed less the deduction made on account of occupation of land by the Salt Department. From this letter it would seem clear that the reason for a reduction of the revenue paid by the estate was that a portion of the estate had been resumed by Government.

A preliminary objection was taken in the written statement on the ground that the Manager of the Court of Wards had no power to bring a suit for khas possession in an attached estate. This objection, we may observe at the outset, is relevant only so far as the

CIVIL.

1921.

Secretary of State  
for India in Council  
v.  
Annada.

CIVIL.

1921.

Secretary of State  
for India in Council.

Annada.

plaintiffs Nos. 1 to 34 are concerned who are described as "Wards of Court by the General Manager, Court of Wards." It does not apply to the 35th plaintiff. But it is contended that if the objection is good against the Court of Wards representing the plaintiffs Nos. 1 to 34 the suit fails as regards the plaintiff No. 35 also on the ground that the plaintiffs Nos. 1 to 34 are subordinate holders under him and that he has no present right to sue. The facts as regards this are that the District Judge exercised the jurisdiction vested in him under the Bengal Tenancy Act and acted under the provisions of section 95A of that Act which provides in section 97 that "in any case in which the Court of Wards undertakes under section 95 the management of an estate or tenure, so much of the provisions of the Court of Wards Act as relates to the management of immovable property shall apply to the management." In the case of the appointment of a Manager by the District Judge under section 95, section 98 contains the provisions applicable to the Manager and, amongst other such provisions, the Manager has "the same powers as the co-owners jointly might but for his appointment have exercised." The contention on behalf of the appellant is that the word "management" in section 97 relates to Part VI of the Court of Wards Act which is so entitled and that that part of the Act does not give powers for the institution of a suit. There is no reference in section 97 to Part VI of the Court of Wards Act, but the argument is based on the fact that Part VI of the Court of Wards Act deals with management and on the contention that that part contains the whole of the powers of management which are conferred in the case of the Court of Wards taking over a property under the provisions of section 95(a) of the Bengal Tenancy Act. It is argued on behalf of the respondents that, though it cannot be said that the plaintiffs are disqualified proprietors, the case must be treated in the same way as if they were such and that, under the provisions of section 97 of the Bengal Tenancy Act, it is not merely Chapter VI of the Court of Wards Act which is made applicable but all sections of the said Act which have any reference to management and there are provisions relating to management which are not included in that part; that the effect of taking over a property by the Court of Wards is to prevent the proprietor from managing it that it is not the intention of the legislature that the Court of Wards managing a property which has been made over to it under the provisions of section 95(a) of the Bengal Tenancy Act should have any less powers than a manager appointed by the Judge under the provisions of section 98 of the Bengal Tenancy Act and that, as in a case which comes

directly under the provisions of the Court of Wards Act the manager has the power of suit, it must reasonably be held that the same power of suit exists as a part of the general management in the case where the management of an estate has been made over to it under the provisions of section 95A of the Bengal Tenancy Act.

It must we think be taken to be a reasonable interpretation that when the Bengal Tenancy Act gives the District Judge the power to direct that an estate be managed by the Court of Wards in such case that body has the same powers as it has in regard to other estates directly coming within the provisions of the Court of Wards Act. In the latter case, there would be a power of suit in the Court of Wards. Should we say then that because an estate comes to the Court of Wards not directly but through the mechanism of the Bengal Tenancy Act the manager has no such power? As regards the manager appointed under section 95 (b), it has been held that he is competent to sue to recover possession of land: *Sibo Sundari v. Raj Mohan* (1). In our opinion, there is no ground or reason for holding this and at the same time holding that there is no power of suit in the case of an estate taken under section 95 (a). We are of opinion that section 97 gives the Court of Wards power to sue in the case of an estate which comes to it under the provisions of section 95 (a) of the Bengal Tenancy Act. It is argued that under section 95 (a) the estate to be managed is that which is handed over and was handed over before the churs in suit formed. But the word "estate" there means we think all that the holder is entitled to by way of reformation or accretion. The lands which were handed over to the manager were the whole estate in which subsequently the lands in suit are said to have reformed. If there had been no dispute between the parties as to the title to these lands, it could not we think be contended that the Court of Wards had no power to take steps to manage these lands as churs which had formed within the ambits of the estate made over to their management. It is not contested that where an estate directly comes to the Court of Wards, it has power to sue and this appears to us to be part of its powers of management. In our opinion, it has the same power when the estate comes to it indirectly through the mechanism of the Bengal Tenancy Act. Possibly the legislature in enacting section 97 of the Bengal Tenancy Act intended to draw a distinction between the management of the property of the co-owners and the care of their persons. It is admitted that there

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

CIVIL.

1921

Secretary of State  
for India in Council

Annada.

is no decision to the contrary effect and we hold, therefore, that this objection fails.

Passing from this preliminary objection we will deal first with the contention that there has been an abatement or reduction of revenue in respect of the estate and that, therefore, the plaintiffs must show not merely what were their lands at the time of the permanent settlement but that the lands in suit are reformations of lands of which they have been paying revenue since such alleged abatement. No such case was made in the written statement, though the materials upon which it is based were in the possession of the Government. It was put forward for the first time after the evidence had been closed on both sides. The learned Judge refused at that stage and under the circumstances of the case to allow this issue to be raised. He however, permitted the defendant to argue the point on the plaintiffs' evidence and held that there had been in fact, no abatement. It is objected that the Court should have allowed the issue. For the purpose of this judgment we may assume (without so deciding) that the Court should have allowed the issue to be raised. It is, however, a different question whether the appellant is entitled to a remand to obtain evidence on this point. Dr. Dwarka Nath Mitter who appeared for the Government in the lower Court and before us admitted that he did not ask to give evidence on this issue in the lower Court and that he was then willing to have the point determined on the record as it then stood. Before us, however, the learned Advocate-General asks for a remand. But it is quite clear that he has not in mind any definite evidence which is known and can be produced. He stated that he wished to have an opportunity to examine the resumption records in order to see how matters stood as regards the lands resumed and whether they or any other lands had diluviated. He spoke of "being in the dark" as regards these matters. It is obvious that whilst it might have been a matter of doubt whether when a particular piece of evidence was put forward as available the Court should allow a remand seeing that no evidence was offered in the lower Court, it is also clear that such a remand should not be allowed at the present time after so long a trial merely for the purpose of making an enquiry whether there is any evidence to be produced. The judgment was given in November 1918, and, if there were any evidence, steps should have been taken meanwhile to ascertain what it was. Had the appellant then come to Court and said "Here is the evidence I want to prove. I ask for a remand in order that I may prove it," there would at least have been a matter for consideration.

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Annada.

But here all the evidence that there may be is in the Government's possession and has been so all along. Notwithstanding that the point was not taken in the pleadings till after the close of the evidence and since then nothing has been apparently done to ascertain the facts. It is, to our minds, quite clear that no remand should be allowed and we refuse the same. We will for the purpose of this judgment (and without so deciding) assume that the objection may be raised notwithstanding that it was not taken until after all the evidence had been given and the case closed and will consider the question on the evidence as it is now before us. The facts of this question of abatement have been already fully stated. If an abatement were established, then undoubtedly the plaintiffs would have to show that the land in suit was not merely a reformation of the lands settled with them in 1793 but of lands other than those in respect of which abatement was made and of lands for which they have been and are now paying revenue. It has been contended by the appellant that there had been an abatement of some Rs. 13000 that is, that the revenue is paid at the rate of Rs. 44413-15-5 instead of Rs. 57435-13-4 and that this abatement was allowed not only as regards the lands resumed but in respect of diluviated lands also. For the respondents it is argued that they never asked for an abatement and that all that happened was that they refused to assent to the arrangement proposed by the Government as set out in Mr. Ricketts' letter which we have mentioned and that it must in consequence be assumed that the state of things as it existed prior thereto continued up till the present date, namely, that the revenue was Rs. 57435-13-4, a deduction being made in respect of lands taken possession of by Government and which the respondents refused to take back on the terms offered to them by Mr. Ricketts. It is further contended that abatement is only evidence of relinquishment of lands and that there has been none. There was, it is said, no request to deduct or agreement to deduct. For the Crown, it is argued that after this length of time it must be taken that, though the respondents may have refused to accept Mr. Ricketts' offer, there has been an acquiescence in the Government resolution allowing a deduction of revenue.

It is not necessary to decide whether there has been an abatement of revenue or not because in this case we may assume (without deciding it) that there has been such an abatement without such conclusion affecting the decree which the plaintiffs have got, for, we are of opinion that, as is clearly shown by the letter from the Secretary to the Bengal Government to the Board of Revenue, the alleged

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

abatement was given, as was expressly stated, not in respect of any diluviation but in respect of resumption of lands, though it is a fact that the diluviation was mentioned in Mr. Ricketts' letter. The lands so resumed in respect of which the alleged abatement was given are shown to the west of Kelso's line. It is suggested that there may have been some diluviated land to the east of Kelso's line which had been lost previous to the making of his map. This hypothesis seems to be unfounded on the facts, for, if abatement had been given for diluvion as well as resumption that would have been stated in the final order of the Government of Bengal. The letter to the Board does not so state but explicitly says that the abatement was given for the resumed lands. If this be so, as we find it to be, it is immaterial whether there were any diluviations. What is important and relevant is to ascertain the position of the resumed lands in respect of which according to the letter we have mentioned

- a reduction of revenue is alleged to have been given. These lands are shown to the west of Kelso's line and as the lands in suit are to the east of that line and to the west of the line of Rennell's map which (as later held) shows the eastern boundary of the pargana; it follows that the lands in suit cannot be the lands in respect of which abatement, if there was any, was allowed, but are, if Rennell's line be the true eastern boundary, reformations of land for which the plaintiffs have paid and are paying revenue. The question then whether there was or was not an abatement is in this view of the case immaterial. Whether Rennell's line is the eastern boundary of the pargana depends on our finding as to whether the preceding decision of 1895 on this point is *res judicata*, and, if not, whether the line of Rennell should be accepted as established on the evidence given in this suit.

Passing to the issue as to *res judicata* it is the case that the subject matter of the suits is different but the identity of the property in the two suits is not necessary. What is contended is that the eastern boundary in 1793 of the pargana in which the lands formerly and now in suit were and are is the eastern boundary as shown in Rennell's map. It is not contended that there is a *res judicata* upon the question whether Rennell's map was correctly laid in the map in the former suit all along the eastern boundary that is beyond char Dampier. A distinction must be drawn between the question whether the eastern boundary is that depicted in Rennell's map and whether that map was correctly laid in the previous suit beyond the actual boundary then in question. The eastern boundary had to be ascertained before it could be found whether char Dampier was



CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

in the pargana or not. It was necessary to decide the eastern boundary of the pargana in the previous suit and the same has been found it is said to be necessary in the present case on the issue dealing with the merits the bulk of the evidence dealing with the question whether Rennell's or Kelso's map should be taken to depict the eastern boundary. We think this contention is sound as also the argument that even if it were not necessary (which we think it was) the question of the eastern boundary was submitted for decision and decided. We have in the statement of facts fully set out those which bear on this point. It is the case that there was no formal issue as to the eastern boundary of the pargana but the whole history of the proceedings prior to the suit of 1895, the pleadings in that suit, the judgment and decree show that the question which was agitated between the parties was whether the eastern boundary of the pargana was the line of Rennell or of Kelso. This was the groundwork of the judgment. In the latter it was stated that it was necessary for the purpose of the issues to find out what was the state of things at the time of the permanent settlement that is whether the spot on which Char Dampier formed was land or water at the time of the permanent settlement. How was the Judge (we refer to the particular circumstances of this case) to arrive at this conclusion but by ascertaining the eastern boundary of the pargana? The judgment further stated as follows:—"Both parties ask the Court to presume that the eastern boundary of pargana Dakhin Sahabazpur as found in the maps upon which they respectively rely (that is Rennell and Kelso) existed at the time of the permanent settlement. It was also stated that at the request of the plaintiff and with the consent of the defendant the Amin was directed not to go to the spot but to draw the lines of the several maps on the cadastral survey map so that the limits of pargana Dakhin Sahabazpur may be easily ascertained." His report refers to the line of the Sahabazpur river according to the maps prepared by Rennell and Kelso and the testing of the correctness of Rennell's map. The Judge then fully examined the question whether Rennell's or Kelso's map should be accepted and the conclusion was "Rennell's map should be but guide in deciding the dispute." The decree of course is given directly only as regards the lands then in dispute but reference is there made to the boundary of pargana Dakhin Sahabazpur. As regards this decision there was no appeal. From the order-sheet it appears that in the petition of the defendant a map of the disputed land was directed to be kept with the record as part of the decree. In our opinion

CIVIL.

1921.

Secretary of State  
for India in Council  
v.  
Annada.

the only way whereby either in the past or present suit it was or is possible to decide whether the property in suit belongs to one party or the other is by settling the eastern boundary.

And clearly the eastern boundary could not be settled until the Judge had determined which boundary line he should accept that of Rennell's or that of Kelso's. Until this point had been determined not an inch of the boundary line could be ascertained.

The Subordinate Judge has held that from the extracts of the former judgment the finding of what was the eastern boundary of the pargana—whether according to Rennell or Kelso—was the very first necessary step; then that line had to be relaid; and the third step was to ascertain the position of the land then in dispute in order to find out what portion of it, if any, was the pargana land and what portion was navigable river at the time of the permanent settlement.

• He holds that the determination of whether Rennell's map shows the eastern boundary of the pargana at the permanent settlement was really the foundation or the ground work of the former judgment. In his opinion, it was impossible to find out the boundary line of char Dampier without, first of all, determining whether Rennell's or Kelso's was the eastern boundary of the pargana at the permanent settlement: that was the only means of finding this out; the eastern boundary had long been washed away and there was no landmark either in char Dampier or elsewhere from which it could be ascertained and that in short, if the finding that Rennell's western boundary was the eastern boundary of the pargana at the time of the permanent settlement is eliminated from the judgment, there is nothing to sustain it. He accordingly finds that the decision of the former suit as regards the eastern boundary is *res judicata* and that that boundary was shown by Rennell's map. With this conclusion we agree.

It is further contended and denied that the question of abatement is *res judicata*; that is, the Government cannot raise the question that there has been an abatement of revenue, seeing that in the suit of 1895 it was expressly alleged by the respondents and not denied by the Secretary of State that the lands had been held without deduction of revenue. The question therefore, it is said, is constructive *res judicata*. This raises several questions of difficulty. It is now, however, necessary to decide them because, even if this question of abatement is not *res judicata* as the appellant contends and even if there had been an abatement of rent in fact as he also contends the question is not of practical importance seeing that the lands in respect of which abatement is alleged to have been given

are, in our opinion, resumed lands shown in Kelso's map and these lie to the west of his line with the result that the lands in suit cannot be reformations of lands in respect of which the plaintiffs have been allowed the alleged abatement.

Assuming then that the eastern boundary of the pargana is shown by Rennell's line, a question is raised whether Rennell's map was correctly plotted in the former suit. In the suit of 1895, the Amin prepared a map. In that suit, the Court deputed the Amin to compare Rennell's map, Kelso's map and others on the spot; but, at the request of the plaintiff, namely, the Government and with the consent of the defendant's vakil, the Amin was directed not to go to the spot but to draw the lines of the several maps (one of which was Rennell's) on the Cadastral Survey map so that the limits of the pargana Sahabazpur might be easily ascertained. The Amin accordingly prepared a map showing the limits, amongst others, according to Rennell. The learned Subordinate Judge has pointed out that this map was prepared in the presence of the representatives of the parties and was signed by the Kanungoe deputed by the Government for the purpose. When this map was filed in Court, neither party objected that it was incorrect in any respect. The suit was disposed of accepting the map as correct and the whole line of Rennell was, without objection on the part of the Government, demarcated upon the map annexed to the decree. In the plaint in the present suit reference is made in para. 13 to Rennell's map as being correctly drawn and in para. 22 it is alleged not only that the map was accurate, that is, represented the eastern line of the pargana but that it had been correctly plotted in the previous suit of 1895. Now, the Government in their written statement whilst denying that Rennell's map was accurate did not deny the allegation that whether accurate or not, it had been correctly plotted in the suit of 1895. Then, the 5th issue raised in this suit is "Are the plaintiffs entitled to all lands and chars to the west of the eastern boundary of pargana Dakhin Sahabazpur as shown in the map annexed to the decree in Suit No. 90 of 1895?" The form of this issue, as the learned Subordinate Judge has pointed out, also indicates that up to the time when the issues were framed the defence did not dispute the correct plotting of the eastern boundary. No objection he says, was taken to the form of this issue when the issues were reconsidered and a new issue was framed at the beginning of the trial. The question of the plotting of the map is further discussed in Order No. 104 of the order-sheet dated the 9th September 1918 where the arguments of both parties have been given.

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

We agree with the learned Subordinate Judge who has held that this is not a mere matter of evidence but is an essential and material fact touching the title. He has held that the correctness of the plotting must be taken to be admitted by the defence, though at the trial an attempt was made to dispute it. It is true as we have said, that the accuracy of Rennell's map was contested but not the question whether it was correctly plotted and we think that the argument raised in the suit on behalf of the Crown and also repeated before us that Rennell's map was incorrect implies also that it was incorrectly plotted is not sound, for, the two matters are entirely different. We are of opinion that there is no ground for reversing the judgment of the Subordinate Judge upon this point. We would add further that if there were any substance in this contention, one would have expected that the Government would have during the two years which have elapsed since the date of the decree had a map prepared which would have shown whether or not Rennell's map had been correctly plotted or been prepared to show by expert evidence that it could not be relied. This could have been produced or stated and the Court might have been asked to allow evidence to be given to prove what the map so prepared showed or the evidence would prove. We do not say that such an application would necessarily have been successful but at any rate, it would have made the position of the appellant stronger than it now is; for, he is asking for a remand upon a fact which the learned Judge has held must be taken to have been admitted and he is not even now in a position to show to us by a map prepared by an expert in what respect the previous plotting was erroneous. As it is thus established that the line of Rennell is the eastern boundary of the pargana by virtue of the previous decision in the suit of 1895 and as it must be taken that that boundary was correctly plotted in the map in the suit of 1895 and as it is an admitted fact that the lands in suit lie to the west of that eastern boundary and to the east of Kelso's line, it follows that the lands in suit must be taken to be reformations of land in respect of which the plaintiffs have been and are now paying Government revenue.

These findings dispose of the appeal but having regard to the fact that possibly our judgment may be the subject of appeal, we propose to deal also with the issue of the eastern boundary as a question of fact independent of the findings in the previous suit which we have held to be *res judicata*.

June, 17.

The preceding portion of the judgment was delivered on the

23rd May 1921 to which date the case was adjourned in order that we might determine whether we should go into the facts of the case in the event of its being found that the issue as to the eastern boundary was *res judicata*. On that day and about a month after the appeal was first opened, a new objection was taken to the suit by the learned Advocate-General on the ground that as regards a portion of its subject matter it was barred by a special law of limitation, namely, section 24 of Regulation 2 of 1819. The portion of the suit said to be barred is that for land other than the two island churs taken possession of by Government to which a period of 12 years is applicable and as regards which therefore no question of limitation arises. In paragraph No. 18 of the plaint it is stated that the proprietors appealed to the Board of Revenue and the Board by its order dated the 9th March 1915 confirmed the proceedings of the Collector and rejected the appeal. Paragraph No. 3-A of the written statement runs as follows :—

“The suit is barred by limitation”. In the issues framed on the 1st November 1916, the fourth issue is “Is the suit barred by limitation.” New issues were framed on the 9th January 1917, and those issues did not contain any issue raising the ground of limitation. It is suggested on behalf of the appellant that this was due to the absence of the Government pleader, a suggestion which it is said is supported by order No. 13, in the order-sheet, dated the 10th January, 1917. However, this may be, new issues were settled in lieu of those framed on the 1st November 1916; and amongst those issues there is no issue raising the ground of limitation. Now, when the hearing of the appeal is well through it is argued that the suit is barred as regards the land, other than the two island churs, because it was not brought within one year of the date of the communication of the Board's order. The order of the Board is dated the 9th March, 1915. It is alleged to have been communicated to the respondents on the 12th April 1915 and the suit was brought more than a year after that date, that is, on the 17th May, 1916. For it has been held that in the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct, as the plaintiffs have attempted to do in this case, the period of two months for service of notice under section 80 of the Civil Procedure. This ground, as we have stated, is raised for the first time almost at the conclusion of the litigation. It is necessary that limitation should be pleaded in all cases. But particularly this is so where the bar is alleged under some special law. The general rule, we think is, that points of

CIVIL  
1921.

Secretary of State  
for India in Council

Annada.

CIVIL.

1921.

Secretary of State  
India in Council

Annada.

limitation, should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact. In this case a question of fact is involved, namely, whether or not the Board's order was communicated, if so, on what date and whether the persons who are alleged by Government to have received notice were authorised agents of the respondents for that purpose. In our opinion this objection which is not contained in the grounds of appeal should not be allowed to be taken at this stage. It is said that the fact that the case is barred sufficiently appears without necessity for remand on the evidence, though that evidence was not given on this issue. We do not think that points of limitation should be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence. Even if the objection could be taken the evidence is not sufficient to support it. The evidence upon which the appellant relies is to be found in the record of the Dera Settlement proceedings from which it appears that notices were served on one Nabin Chandra Guha an ammukhtar on behalf of Apanda Chandra Roy on the 11th April 1915 and on Shyama Charan Chakravarty, manager of the Court of Wards estate on the 12th April 1915. Beyond these facts no others are given bearing upon this question of limitation. They are obviously insufficient. There was for instance no proof of the signatures of Nabin Chandra Guha or S. C. Chakravarty and it is not shown that the receipts which these persons are said to have signed are for a letter communicating notice of the Board's decision. Possibly this may be the fact but we cannot, where limitation has not been pleaded and where no issue has been raised, make any assumptions. If limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed. As stated there is no question as regards the two island churs to which admittedly limitation for the period of 12 years applies. The objection fails. Under the circumstances it is not necessary to consider whether, if the point could be taken, section 24 of the Regulation has applicability to the present case.

We proceed now to determine on the facts and irrespective of the decision in the suit of 1895 what was the line of the eastern boundary of the plaintiffs' property at the time of the permanent settlement which includes the question whether Rennell's map may be taken as showing this. The question before us in its most simple form is this. The plaintiffs have a permanently settled estate. There is no dispute as to the northern and southern boun-

daries and only in a secondary way as to the west. For according to the plaintiffs the western boundary at the time of the permanent settlement was water : according to the appellant it was dry land. The primary question is as to eastern boundary. It is admitted that the western bank of river Sahabazpur was the eastern boundary of the respondents' estate. The question then is what was the position of the river in 1789, the date of the decennial settlement for the permanent settlement of 1793 is based upon the prior one. If the lands in suit are on the west of the river, they fall within the plaintiffs' estate. The plaintiff contends that this is shown by Rennell's map if it is to be accepted as admissible and accurate.

The onus is of course on the plaintiffs though once they have started their case so as to sufficiently raise an inference in their favour they may (as in fact they do) rely on the fact that evidence which if it is in the possession of any one is in the possession of the Government, is not produced.

The onus is sought to be discharged by means of Rennell's map and some settlement reports and books of reference. The case in the main rests on the map. But we will first deal with objections taken to the reports.

The settlement reports are, it is argued, not evidence, and reliance is placed upon the decision in *Ganuradhwaja v. Superundhwaja* (1). As regards Mr. Beveridge's history of the district of Bakarganj it was not referred to in the lower Court, and, its use here is objected to on this ground. The mere fact that the book was not referred to, might not be, of itself, a good objection. If, however, the book was used to establish the existence of facts which the appellant had no opportunity of meeting and which he desired to rebut, the admission of the book now might involve a remand. Accordingly the claim to refer to this history was not pressed. As regards the settlement reports it is to be observed that the appellants' map (AA) was prepared (according to the evidence) on reference to Mr. Jack's Calendar. The case to which reference has been made does not support the exclusion of the reports here referred to and we think that they are evidence. If evidence the appellant desires to make use of them. As stated the respondent does claim the support of other evidence but even if he did not the question whether the map is sufficient must depend on the facts of the particular case. Here they are peculiar in that the whole case is bound up in the decision of the eastern boundary of the estate and that eastern boundary is a river the position of which was one

(1) (1900) I. L. R. 23 All. 37 (48, 49).

CIVIL.

1921.

Secretary of State  
for India in Council

v.  
Annada.

CIVIL.

1921.

Secretary of State  
for India in Council.v.  
Annada.

of the purposes of Rennell's map to locate. So that when we know that the eastern boundary of the permanently settled estate was the western bank of the river and when we know what the position of that river was at the date of the permanent settlement we are in a position to decide the issue before us.

For the appellant it is next contended that the onus cannot be discharged by conclusions drawn from, practically, the map alone.

Major Rennell the Director of Survey made his celebrated maps between the years 1764 and 1773. It is stated that the map which is used in this case was made sometime after 1767. There is no need to discuss the value of Rennell's map in respect of boundaries, location of villages and the like. Here Rennell's map is used for the purpose of ascertaining the position of a river. Whatever else may have been the purpose of their preparation that purpose undoubtedly included the delineation of roads and waterways, and, so their Lordships of the Privy Council in *Haradas v. Secretary of State* (1), adopted the position of the river therein question, as shown in Rennell's map.

Rennell's map however was not contemporaneous with the permanent settlement. It was made some 22 years or so before the decennial settlement on which the permanent settlement proceeded. On this ground therefore the appellants object that it cannot be evidence of a state of things a considerable number of years after its date. If they are right on this then the suit on the facts must fail for the only evidence is Rennell's map. There is no contemporaneous map and subsequent maps are no evidence of the previously existing state of things. The respondents in reply invoke the presumption of continuity. This is a presumption which varies with the circumstances of the case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known in the absence of evidence to the contrary. It may be said (as it is in fact argued here) that a river such as the Meghna is not continuous in its nature but continually variable. Reliance is placed in this connection on the observations in the order of Mr. Strong the Collector in a proceeding under section 76 of Act 9 of 1847 that the Island Dakhin Sahabazpur is notoriously subject to diluvion and alluvion and that in the period which elapsed between Rennell's survey and the permanent settlement half the Island might have been diluviated and have reformed in the shape of new island churs. And in the

(1) (1917) 26 C. L. J. 590.



order of the Board of Revenue it is stated, that, "Rennell's survey was made more than 20 years before the decennial settlement and in a tract such as this, which is situated on the Bakarganj littoral and is subject to violent fluvial and tidal action it furnishes no safe indication of the actual position of mouzahs at the time of the decennial settlement." In the judgment in the 1895 suit, the learned Judge stated "that from time immemorial the Meghna has been continually diluviating its right bank along the eastern boundary of Dakhin Sahabazpur pargana and that a considerable portion of it is now under water."

In a petition filed by the manager of the Court of Wards to the Deputy Collector it is stated that the petitioner was surprised and alarmed that the revenue authorities were making attempts to assess all the lands outside the Revenue Survey lines although up till then it had been admitted by the Government that a considerable portion of the zamindaris Nos. 1763 and 1764 permanently settled in 1793 had been washed away by the Dakhin Sahabazpur river before the Revenue Survey was made. With the exception of the last-mentioned petition the other statements are strictly not evidence in the case on this point. As regards the judgment in the 1895 suit it is either *res judicata* as we have held, in which case the present question need not any longer be discussed, or if it was not *res judicata* the observations of the learned Judge are not evidence. No attempt was made in the lower Court to call evidence on the subject of the variability of this river. We have however the fact that resumption proceedings did take place in the years 1840 to 1847; with reference to diluvions referred to in Mr. Rickett's letter dated the 30th November, 1848. Further there are the proceedings as regards Hassan Tajuddin and Dampier churs.

The respondents admitted that there was diluviation on the east of the pargana after the date of the permanent settlement and some changes on the western side of the pargana prior to that date. On the other hand, it is submitted that, so far as the evidence before us shows, no claim was made or proceedings taken as a consequence of changes in the river prior to the resumptions commenced in 1840 and continued until 1847 after which in the year 1848, survey of such resumptions was ordered. Part of the land was in possession of the Salt Department and if there had been loss of land by fluvial action the Salt Department might have claimed an abatement of rent; but they did not do so. Moreover, it is said that if there be any evidence of what occurred between the date of Rennell's map and the permanent settlement, such evidence must be in the possession

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Annada.

of Government but it has not been produced; and that therefore we are entitled to assume that Rennell's map in a sufficient and substantial way indicate the position of things at the date of the permanent settlement.

The question is one which is not without difficulty. The facts establish that between the date of Rennell's map and the permanent settlement there were considerable changes on the western side of the pargana in the form of silting up. In fact such silting up is relied on by the respondents to explain certain facts which the appellants put forward to show the inaccuracy of Rennell's map. It is also common ground that there has been extensive diluvion on the east after the date of the permanent settlement. If we are to consider both these facts it may be argued that they dispose of any presumption of continuity. But the question here is a narrower one, namely the position of the eastern boundary line. Are we to presume that that remained unchanged from the date of Rennell's map until that of the permanent settlement. The only evidence on this point is as to a period subsequent to the permanent settlement. In the absence of any evidence to the contrary as to the state of affairs between the date of Rennell's map and the permanent settlement we think we should assume that on the eastern side Rennell's map may be taken to represent the state of things there at the time of the permanent settlement. In fact it seems established that it is since that time that a strong drift of the river towards the west with diluvion of the eastern boundary has been observed. Whether Rennell's map is otherwise good evidence and accurate is of course another question with which we deal later. All that we now hold on this point is that the map is not excluded on the ground that it is not contemporaneous with the permanent settlement because as regards the eastern side of the pargana with which we are almost directly concerned the state of things appearing in Rennell's map may be deemed to have continued until the permanent settlement. Whilst it appears to be the fact that changes did meanwhile take place on the western side this is not inconsistent with the eastern boundary having remained during the same period substantially unchanged. There is perhaps the less chance of error in this case, that is of giving the plaintiffs more land than that to which they are entitled because it is admitted that the river has been diluviating his estate on the east since the permanent settlement; and as to the anterior period up to the date of Rennell's map either we must assume that things remained as they were or if not it is natural to suppose that the admitted and constant nature of the

diluvion after the permanent settlement is an index of the nature of the diluvion in the anterior period mentioned. If then we may refer to Rennell's map as evidence there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible evidence. Under that section "the Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate." It is thus not necessary to refer to or to rely upon statements made in this suit or in the suit of 1895 as to the value, and therefore accuracy of Rennell's maps for the purposes for which they were prepared, namely, amongst others, the delineation of rivers and other waterways. It is for the appellant in this case to rebut the presumption of accuracy of the map in relation to the facts of this particular case, and this he has, in fact, attempted to do.

It is for the plaintiffs to show that Rennell's map is admissible in evidence of the state of things at the permanent settlement. But if this is done, it will be assumed to be accurate unless the contrary is shown by the respondents. Before dealing with his criticism on the accuracy of Rennell's map we will first refer to another matter.

An objection was taken that the map on which the Amin worked in the previous case as Rennell's map has not been produced and that it is not shown to be Rennell's map. There does not appear to be any ground of appeal on this head. Paragraph 60 of the memorandum of appeal to which we have been referred, deals with another matter, namely, "that no decree should have been granted to the plaintiffs on the basis of Rennell's map alone seeing that Rennell's map was never compared with local conditions and never checked by measurement in the locality by any surveyor whether of experience or otherwise." That is not the point raised by this objection. The point here is that the map (Ex. No. 23) is inadmissible, and indeed irrelevant, because it has not been shown that it was made with reference to Rennell's map. It is true that objection was taken to the admission of this map in the lower Court but not on the ground which is here urged. No such ground can, in our opinion, be urged now; for if such objection had been taken in the lower Court, the plaintiffs might have met it by re-plotting the boundaries with reference to a copy of Rennell's map as to which there could be no dispute. It is true that the plaintiffs contended that the correctness of the plotting in the previous suit was admitted and should not be gone into again. But if the objection had been taken then which is taken before us now to the admission of the map

CIVIL.

1921.

Secretary of State  
for India in Councilv.  
Aonada.

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

(Ex. 23) and such objection had been decided against the plaintiffs, then the plaintiffs might have asked to replot the boundaries with reference to some admitted copy of Rennell's map. Moreover, the admission that the plotting in the previous suit was correct, assumes that Ex. No. 23 which shows such plotting, was made with reference to Rennell's map. Otherwise the plotting would not be correct? In fact this objection is only another form of that with which we have already dealt viz., the correctness of the plotting of Rennell's line in the map of the previous suit. The Amin also says that he was given a copy of Rennell's map. There does not appear therefore to be any substance in the contention that the Amin in the previous suit proceeded upon the basis of some map other than Rennell's or that at any rate it had not been shown that the map on which he did proceed was Rennell's map. We hold that the Amin did work with reference to Rennell's map.

We next deal with the grounds which have been put forward to rebut the presumption of accuracy of Rennell's map assuming it to be admissible.

The appellant contends in the first place that Rennell made a mistake of some 5' 45" in the longitude of Fort William Semaphore Station Calcutta the starting point of his survey, and hence argues that the map as relaid by the Amin in 1895 must be some 6 miles too far to the east. It is however quite immaterial in the present case whether Rennell did or did not know the correct longitude of the Semaphore Station for Rennell has taken the Semaphore Station as zero and has calculated his longitudes from the Semaphore Station treating the station as zero. If we want to discover the longitude of any point on Rennell's map when referred to Greenwich all we have to do is to add the correct longitude of the Semaphore Station, to the longitude given by Rennell's.

What the Amin did was to enlarge Rennell's map to the same scale as the survey map.

He then superimposed the map on the survey map. This is quite easy as he knew what was the correct longitude of Rennell's starting point.

The main difficulty in relaying Rennell's map has been the determination of the starting point. This has been determined by the Survey Department to be the Semaphore Station.

It is quite easy to find the corresponding longitude of any place given in Rennell's map on the survey map by adding to the longitude of the place on Rennell's map the correct longitude of the Semaphore Station. The Amin who relaid the map knew the cor-

rect longitude of the Semaphore station as given in the survey map. What was important and absolutely necessary was to know the point from which Rennell started and the longitude of the point. It is immaterial once the point has been discovered that Rennell gave it an incorrect longitude for Rennell treated it as his zero. Rennell's error in the longitude of his starting point (the Semaphore station) would only be of importance in determining what the starting point was.

Secondly, the appellants contend that Rennell himself never surveyed the island of Dakhin Sahabazpur but that it was surveyed by Richie. His contention is based on the fact that no mention is made of the survey of Dakhin Sahabazpur in Rennell's diary and also on the opinion of Major Hirst. But we have only got Rennell's diary up to 1767. It is possible that either he discontinued writing his diary or it has been lost for his survey was continued up to 1773.

Moreover it is really immaterial whether Rennell or Richie made the survey for the presumption of accuracy under section 83 arises from the fact that the maps are made under the orders of Government and not that they were made by Rennell. Further Rennell apparently supervised and corrected Richie's work.

We pass to Dr. Mitter's third argument to shew that Rennell's map is inaccurate.

Rennell's map shews the western boundary of Dakhin Sahabazpur to be water. If we relay Rennell's map on the present survey map we shall find that the western boundary is dry land and that there are permanently settled estates to the west of Dakhin Sahabazpur and immediately contiguous to it. These permanently settled estates must have been therefore part of the original island of Dakhin Sahabazpur at the time of the permanent settlement. Therefore the island of Sahabazpur must be placed further to the west so that the western boundary coincides with what is the western boundary of the island of Sahabazpur. Rennell had placed the island too far to the east.

The respondent contends on the other hand that the island was correctly placed by Rennell. That there are a number of islands shown by Rennell on west of Dakhin Sahabazpur and that by accretion these islands have been joined together and now form solid land contiguous to Dakhin Sahabazpur island and the river Betua which is the western boundary of Dakhin Sahabazpur has been growing smaller and smaller through silting up. He shews from Kelso's maps that even in 1840 the Betua was a big

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

river perhaps two or three miles broad while now it is a narrow stream. That all the lands immediately to the west of the Betua as it now is are new formations since the time of Rennell and that they were not permanently settled estate at the time of the permanent settlement. Even if at the time of the permanent settlement the western boundary of pargana Sahabazpur was dry land that would not prove it was dry land when Rennell made his survey. The appellant to show that the western boundary of the pargana at the time of the permanent settlement was land and not water contends that two permanently settled estates were then actually contiguous to Dakhin Sahabazpur viz., North Sahabazpur and Kristodaspur.

To prove that these two estates North Sahabazpur and Kristodaspur were contiguous to South Sahabazpur at the time of the permanent settlement he has relied on certain quinquennial returns filed by the zamindar in 1802 which give according to him the list of the kismats etc. which formed the permanently settled estate in 1793 and more specially on the entries of kismats Deguti, Gurmani and Kathali to shew that North Sahabazpur was contiguous in 1793.

The eastern boundary of one of these viz., of chur Gurmani alone is given as Dakhin Sahabazpur. The importance of the others is to shew the position of chur Gurmani. This Gurmani is shewn as a chur and no revenue is assessed on it.

But this evidence does not put the case very high. At the highest it would show that the zemindar of North Sahabazpur claimed in 1802 as part of their permanently settled estate this chur Gurmani. It would not prove necessarily that chur Gurmani was in existence in 1793. That would only be proved by the papers of 1793. In 9 years many churs may have formed or disappeared.

Moreover even assuming that chur Gurmani was in existence in 1793 and so that there was dry land contiguous to South Sahabazpur on its western boundary that would not prove that Rennell in 1767 had not depicted correctly the then state of affairs. It is quite possible that subsequent to Rennell's survey the islands shown by him on the west of Dakhin Sahabazpur became joined up together and joined up with Dakhin Sahabazpur. Thus it is quite possible that at the time of the permanent settlement the western boundary of Dakhin Sahabazpur was no longer water but land. But there is nothing to shew how much was water and how much land. Chur Gurmani might be merely a small chur which temporarily connected Dakhin Sahabazpur with other estates. That obviously would not of itself shew that Rennell had incorrectly placed the island of

Sahabazpur in 1767 or that the eastern boundary of the island had changed between the time that Rennell depicted it and the permanent settlement. We are not entitled to assume that because land had formed on the western boundary between Rennell's survey and the permanent settlement that land had diluviated from the eastern boundary. The same arguments apply to churs Pata, Bedarulla, Subhi, and Khalifa which plaintiffs included in their estate of Dakhin Sahabazpur at the time of the permanent settlement and which the appellant alleges are west of Rennell's line. They are possibly accretion to the island and may well have formed between Rennell's survey and the permanent settlement.

A glance at the map would shew that most of the land west of Rennell's western line is chur. Some land which appear to be of a more or less permanent nature correspond roughly with some of Rennell's islands which fact would go to shew the correctness of his survey.

The appellant then argues that certain four churs Sibpur, Bedar, Madaphar and Sibsankar were resumed by Government in 1840 that these churs lie well to the west of the present line which the plaintiff claims as his boundary and so the appellant argues that the plaintiff by that admitted that the boundary line was Kelso's line. He would seem to contend that the plaintiff knew then where the boundary line really was as witnesses who had been alive at the time of the permanent settlement were then available.

It appears that in two cases Madaphar and Sibsankar the plaintiff did appeal to the Commissioner unsuccessfully. In the other two cases he did not contest them. No suit was brought to set aside the decision.

But the conduct of the plaintiff proves little or nothing. It may well be that he had no material at his command then to prove where the boundary was. As far as can be seen Rennell's map were not discovered till many years later. Moreover these lands apparently formed part of the land that had been in the occupation of the Salt Department. It is quite possible that the zemindar did not think it worth while to spend any money fighting the point with Government. Then it is to be remembered that with regard to these resumed lands as they were called and revenue payable the zemindar was in communication with the revenue authorities and withheld payment of the sum of Rs. 13,000 formerly debited to the Salt Department with the result that the Government took action as stated in the letter of Mr. Rickett by subsequent correspondence to which we have referred. At this distance of time it is not pos-

- CIVIL.

1921.

Secretary of State  
for India in Council

Annada.

CIVIL

1901.

Secretary of State  
for India in Councilv.  
Annada.

sible to determine exactly what were the facts. We do not think that those above stated can be construed into an admission by the zemindar that he knew quite well that the boundary line lay to the west of these churs. Furthermore it must be remembered that until the decision of the Privy Council in the case of *Lopez v. Muddun Mohan Thakur* (1) it had always been held that land reformed *in situ* belongs not to the zemindar but the Government. It was *Lopez's* case (1) which set the point at rest.

Fifthly, the appellant has contended that certain villages for instance Colya, Govindapur, Mendigunge are shown in Rennell's map and are now found to be at some miles distance. This we do not think is of much importance. In the first place the object of Rennell's survey was not the villages but the rivers and waterways, and he would not be very particular as to the exact site of the villages. Secondly, the villages from the nature of the country often shift. Thirdly, these villages are often long straggling villages and it is not possible to say what part of the village Rennell took for the dot which represents the village.

To sum up we do not think that the appellant has succeeded in proving that Rennell's map incorrectly depicted the position of the island of Dakhin Sahabazpur in 1767 or that in 1793 there was any change in the eastern boundary of the island from what it was in 1767.

We are of opinion that the appellant has not established sufficient grounds for a reversal of the decision now under appeal and we accordingly dismiss his appeal with costs.

A. T. M.

*Appeal dismissed.*

(1) 1870 13 M. L. A. 467.



Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.  
Justice Richardson.

SARBESWAR PATRA

v.

MAHARAJA SIR BEJOY CHAND MOHATAP AND OTHERS\*

CIVIL.

1921.

June, 17.

*Ejectment—Raiyat holding at fixed rate, if can acquire right of occupancy—*

*'Protected interest'—Bengal Tenancy Act (VIII of 1885), Secs. 20, 21, 160*

*(d), 167—Previous history of an Act, when can be resorted to.*

*Per curiam* : The interest of a raiyat at a fixed rate, who has occupied his holding for a continuous period of more than twelve years, is a protected interest within the meaning of section 160 of the Bengal Tenancy Act and cannot be annulled by a notice under section 167 : *Dictum* in *Bhut Nath v. Manmatha* (1) not followed. *Abdul Gani v. Mabbul* (2) ; *Akhil v. Tripura* (3) ; *Lakhi v. Hamid* (4) and *Lakhi v. Mokal* (5) distinguished.

A raiyat at a fixed rate may become a settled raiyat of the village under section 20 of the Bengal Tenancy Act and thus acquire a right of occupancy within the meaning of section 21.

The status of a raiyat at a fixed rate can be combined with that of an occupancy raiyat.

*Per Richardson J* : The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extended.

Where an Act speaks with an uncertain or ambiguous voice, resort may be had to the previous history of the subject for light and guidance in construing its provisions.

Appeal by the Plaintiff.

Suit for a declaration of the plaintiff's jote title, for recovery of possession and for recovery of price of paddy.

The material facts appear from the judgment of the learned Chief Justice.

*Babus Ram Chandra Mazumdar* and *Narendra Nath Chowdhury* (for *Babu Kiran Chandra Neogy*) for the Appellant.

*Babus Bipin Behary Ghose* and *Sarat Kumar Mitter* for the Respondent No. 1.

\* Appeal from Appellate Decree No. 1890 of 1919, against the decree of *Babu Sarat Chandra Bose*, Subordinate Judge of Bankura, dated the 23rd June, 1919, reversing that of *Babu Thakurdas Banerjee*, Munsiff, 2nd Court, at Bistupur, dated the 1st February, 1918.

(1) (1909) 11 C. L. J. 98 ; 13 C. W. N. 1025 (also reported as *Bhut Nath v. Surendra*).

(2) (1914) I. L. R. 42 Calc. 745 ; 22 C. L. J. 223.

(3) (1915) unreported. S. A. No. 847 of 1913.

(4) (1917) 27 C. L. J. 284.

(5) (1917) 27 C. L. J. 293.

CIVIL.

1921.

Sarbeswar

v.

Maharaja,  
Bejoy Chand.

June, 17.

The judgments of the Court were as follows :

**Sanderson, C. J.**—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Bankura.

The suit was brought for a declaration of the plaintiff's jote title in certain land, for recovery of possession thereof and for Rs. 15 as the price of paddy alleged to have been wrongfully taken by the defendant No. 1. The learned Judge stated the respective cases as follows :—

"The plaintiff's case is that in mouza Chuamasina he held 11 bighas of land with occupancy rights at a jama of Rs. 5. This jama was held formerly by him under the malik Hriday Nath Sarkar : after his death under his son Ashutosh Sarkar and then under Ashu's vendee Haridas Choudhury. Out of these 11 bighas, 5 bighas form the subject of the suit. The plaintiff alleges that he was in possession of the disputed land through his *bhagchasi*, defendant No. 2 and got his share of *naon* paddy of 1 bigha in 1323 and that his share of the *Heot* paddy grown on the remaining 4 bighas was stocked in the house of defendant No. 2 but defendant No. 1 forcibly took it away on the allegation that the lands had been made khas by defendant No. 3, the Maharaja of Burdwan by purchasing the same in execution of a decree for arrears of rent against the maliks and had been settled with him."

"The substantial defence of the defendants 1 and 3 is that the interest of Ashutosh Sarkar and Haridas Choudhury in the lands was that of occupancy *raiya*s which was purchased by defendant No. 3 on 2-11-14 in a rent sale, that a notice under section 167 having been given to the plaintiff, among other persons, on 7-5-15, he became entitled to *khas* possession and that he has accordingly taken the paddy from defendant No. 2".

"The lower Court" (i. e., the first Court) "decreed the suit on the finding that the *status* of the plaintiff's landlord was that of a tenure-holder and that the plaintiff is a raiyat with rights of occupancy which being a protected interest under section 160 B. T. Act his right was not annulled by service of notice under section 167."

The first question, with which the lower appellate Court dealt, was the status of the plaintiff's landlord : The lower appellate Court agreed with the Court of first instance that Hriday Sirkar was a tenure-holder, and that his right of an occupancy raiyat, as alleged by the defendant, had not been proved.

That finding therefore, so far as it went, was in favour of the

plaintiff. The learned Subordinate Judge then proceeded to consider the *status* of the plaintiff, and on this question he disagreed with the finding of the Court of first instance.

CIVIL.  
1921.  
Sarbeswar  
Maharaja  
Bejoy Chand.  
Sanderson, C. J.

The learned Munsif had decided that the plaintiff held the land in suit as a *raiyyat* for more than 12 years continuously, that under the provisions of section 20 of B. T. Act he had become a settled raiyat of the village and that under the provisions of section 21 of the same Act he had acquired a right of occupancy in the land in suit. Consequently the learned Munsif held that the plaintiff had a protected interest under section 160 of the Bengal Tenancy Act which could not be annulled by the service of notice under section 167 of that Act. The learned Munsif decreed the suit.

The lower appellate Court overruled this last mentioned finding and held that although the plaintiff, who was a raiyat at fixed rate, had occupied the lands for more than 12 years, he did not acquire a right of occupancy, which was protected under section 160.

The learned Subordinate Judge further held that notice had been properly served on the plaintiff, that the plaintiff's interest not being a protected one, it became annulled and that the defendant No. 3 was entitled to take khas possession of the disputed land. He therefore held that the plaintiff had no cause of action, allowed the appeal and dismissed the plaintiff's suit.

The question in this appeal is whether the decision of the lower appellate Court on this point is correct.

The facts, which it is necessary to state for the purpose of my judgment, are as follows: The land in question was settled to the plaintiff by Hriday Sirkar in 1301 B. S. at a *jama* of Rs. 5 per annum and he had regularly paid rent for it since the year 1303 B. S.

The plaintiff reclaimed the lands, which he himself cultivated in the first instance, and subsequently the land was cultivated by the plaintiff's "bhag chasis." The quantity of land is far below 100 bighas.

Consequently, as held by both the lower Courts the plaintiff is a raiyat.

The lower appellate Court has found that the plaintiff's jama was "darmokarari" which merely meant a jama "at a fixed and permanent rate of rent." This is a finding which this Court, on second appeal, must accept, and indeed it has not been called in question by either side in this Court.

It must be taken therefore that the plaintiff from the beginning

CIVIL.

1921.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Sanderson, C. J.

of his tenancy was a raiyat holding at a fixed and permanent rate of rent. It is also clear that the plaintiff held the lands in suit as a raiyat for more than 12 years continuously. On behalf of the plaintiff appellant it was contended that in view of the abovementioned facts the plaintiff was by reason of the terms of section 20 of the Bengal Tenancy Act a settled *raiya*t of the village, and by reason of section 21 of the Bengal Tenancy Act he acquired a right of occupancy in the land in suit, that such right of occupancy was protected by section 160 of the Bengal Tenancy Act and could not be annulled by notice under section 167.

On the other hand it was contended on behalf of the respondents (1) that the right claimed by the plaintiff is not protected under section 160 of the Bengal Tenancy Act, because the plaintiff is not a mere occupancy raiyat. (2) That a raiyat at a fixed rent has a higher *status* than a mere occupancy raiyat and that a raiyat, holding from the inception of the tenancy at a fixed rent, cannot subsequently acquire a right of occupancy, so as to obtain a protected interest under section 160.

Several cases were referred to during the course of the argument. The first in order of date was *Bhut Nath Naskar v. Manmatha Nath Mitra* (1), which was decided in 1909. In that case Doss, J. held that it was not possible for a raiyat of a holding at a fixed rate to have in the same holding a right of occupancy at the same time, the incidents of the two holdings being so diverse in their character.

There was an appeal from the learned Judge's judgment which was heard by Jenkins, C. J. and Mookerjee, J., Jenkins, C. J. held that the appeal should be dismissed on the ground that the interest of the defendant was a tenure and therefore not a protected interest within the meaning of section 160 of the B. T. Act: the learned Chief Justice expressly refrained from discussing the abovementioned question which was considered by Doss, J. as it was unnecessary for the decision of the case. The other learned Judge, Mookerjee, J., did deal with that question and stated the point as follows:—  
"As regards the second contention of the appellants that if they are raiyats holding at a fixed rate of rent they have also acquired a right of occupancy, I am unable to hold that the argument is well-founded" and after stating his reasons in respect thereof the learned Judge held that the view taken by Doss, J. was correct.

It was urged by the learned vakil for the appellant that this

decision of the learned Judge was not necessary for the disposal of the case, that it was not the judgment of the Court, but of one Judge only and was not binding upon this Court. This position was not denied by the learned vakil for the respondent: I agree that, having regard to the fact that the learned Chief Justice decided the case on the ground that the defendant's interest was a tenure and he expressly refrained from giving any opinion on the point now under consideration, the case cannot be held to be binding on this Court though, it goes without saying, that the observations of the learned Judge who did deal with this question, are entitled to much weight and consideration.

The next case in order of date was *Abdul Gani Chowdhury v. Makbul Ali* (1), decided by Holmwood and Chapman, JJ. on 28th July 1914. At page 748, the learned Judges are reported to have said:—"It may be argued that a person who takes the tenancy originally as a raiyat at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right. That appears to us to be neither in accordance with equity or common sense of the wording of the law."

Reference was then made to an unreported case decided by Woodroffe and Newbould, JJ.: *Akhil Chandra Sen and others v. Tripura Charan Chaudhury and another* (2). The judgment was delivered on 26th May 1915. In that case Woodroffe, J. said as follows:—"From this it appears that what was given was a permanent raiyati interest described as istemrari kaimi raiyati and istemrari daimi kaimi pottah. If this was the grant of a permanent interest, and, if, as admitted, at the date of this grant, there was no occupancy right which had matured, then it seems to me not possible that an occupancy right could be acquired after the date of the grant. But if we read this document in reference to this permanency as relating solely to the fixity of rent, then I think the argument of the learned pleader for the respondents, avails, that the appellants would in that case be in the position of raiyats at fixed rates. It is not every raiyat who is protected, but only an occupancy raiyat, and I think the distinction on which he has relied and which is that set out in the Bengal Tenancy Act distinguishing occupancy raiyats from raiyats at fixed rates and non-occupancy raiyats must be borne in mind and on this point he has referred to the case

CIVIL,

1921.

Sarbeswar

v.

Maharaja

Bejoy Chand.

Sanderson, C. J.

(1) (1914) I. L. R. 41 Calc. 745; 22 C. L. J. 223.

(2) (1915) Unreported. S. A. No. 847 of 1913.

CIVIL.

1921.

Sarbeshwar

v.

Maharaja  
Bejoy Chand.

Sunderion C. J.

*Panchi Dassi v. Bala Das* (1). I must hold therefore that the appellants were not occupancy raiyats. They were therefore not protected from eviction in respect of the dags covered by Group I. I think that in the above judgment the name of the case *Panchi Dasi v. Bala Das* (1) is a mistake: the reference, is that of the case of *Bhut Nath Naskar v. S. N. Dutt* (1), which is evidently the case the learned Judge intended to mention: *Panchi Dasi v. Bala Das* is reported at page 1031, and does not seem to be material to the question which was being considered by the learned Judge. This judgment on the face of it appeared to be a decision directly in point: but on reference to the record it appeared that the plaintiff had purchased the taraf at a revenue sale, and the question was whether the defendant had a protected interest under section 37 of the Sale Law, Act. XI of 1859.

- The next case is a decision in the opposite direction, *Lakhi Charan Saha v. Mokar Ali* (2) which was decided in February 1917 by Fletcher and Richardson JJ.

The head-note is as follows:

"A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, has a protected interest within the meaning of the proviso to section 37 of the Revenue Sale Law."

The material part of the judgment is as follows:—

"The facts found are these:—First of all, it has been found that the contesting defendant is a settled raiyat of the village within the meaning of the Bengal Tenancy Act. Secondly, it has been found that he holds the land in suit which is in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent. Whatever may be the law as regards other classes of raiyats, it is quite clear on the terms of section 21 of the Bengal Tenancy Act that, contract or no contract, every raiyat who is a settled raiyat of a village and obtains a raiyati interest in other lands in that village acquires a right of occupancy in those other lands; and, if that is so, the present defendant seems to me clearly to have a right of occupancy, in the land in dispute. If he has a right of occupancy, he comes clearly within the proviso to section 37 of Act XI of 1859, and has an interest which has not been annulled by the sale for arrears of revenue."

(1) (1909) 11 C. L. J. 68; 13 C. W. N. 1025.

(2) (1917) 27 C. L. J. 293.

It was contended on behalf of the respondent that this case was not binding on this Court, in respect of the present point, for although sections of the Bengal Tenancy Act were referred to, the question for decision was whether the defendant had a protected interest within the meaning of the proviso to section 37 of Act XI of 1859.

If this be so, then the previous decision of Woodroffe and Newbould, JJ. is in the same position. In my judgment this contention is right. These decisions are not binding on this Court in respect of the point now under consideration although the reasoning of the learned Judge may be of assistance. The reason is that the Court in both these cases was deciding whether the defendant had a protected interest under section 37 of Act XI of 1859. In this case we have to consider whether the plaintiff had a protected interest under section 160 of the Bengal Tenancy Act. Personally, I should have been glad if this matter could have been referred to a Full Bench by reason of the importance of the question, but in view of the conclusion at which I have arrived, that neither of the two last mentioned cases is a decision on the point now before us, it is not permissible for us to refer the question to a Full Bench.

The last case to which I need refer, is *Lakhi Charan, Saha v. Hamid Ali* (1), which was decided in August 1917. Chatterjea and Richardson JJ. there held that a person who has already acquired an occupancy right does not by obtaining a grant of a fixed rent lose that occupancy right, and such a person is protected from ejectment under section 37 of the Revenue Sale Law. In the judgment reference was made to *Abdul Gani v. Makbul Ali* (2), and, at page 288 the following passage occurs:

"The case of *Abdul Gani v. Makbul Ali* (2) in so far as it holds that a person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and that such a person is protected from ejectment, under section 37 supports the view we take and to that extent we agree with that decision. If the opposite view were taken, raiyats who might be holding lands for generations and who might have acquired rights of occupancy, would be liable to be ejected by a purchaser at a revenue sale, simply because they may come under the description of raiyats holding at fixed rates under the Bengal Tenancy Act, by reason of their rent being fixed in perpetuity by contract, or by reason of their holding at the same rent from the time of the Per-

CIVIL.

1921.

Sarbeswar

Maharaja

Bejoy Chand.

Sanderson, C. J.

(1) (1917) 27 C. L. J. 284.

(2) (1914) I. L. R. 42 Calc. 745; 23 C. L. J. 223.

CIVIL.

1921.

Sarbeswar

Maharaja  
Bejoy Chaud.

Sanderson, C. J.

manent Settlement or by reason of a presumption arising under section 50 of the Bengal Tenancy Act that they have been so holding, when the clear intention of the Legislature is to protect such raiyats from ejectment at the hands of a purchaser at a revenue sale."

It therefore appears that there is no decision of this Court in respect of the point now before us which is binding on this Court and consequently it is necessary to consider the question with reference to the facts and the sections of the Bengal Tenancy Act.

The learned vakil for the respondents did not dispute the proposition laid down in *Lakhi Charan v. Hamid Ali* (1), so that it must now be taken that if a raiyat has acquired an occupancy right, he does not lose that occupancy right, by subsequently having the rent fixed by grant, or by one or other of the ways mentioned in that judgment, and inasmuch as there is no merger, of the two *status*, as was admitted by the learned vakil for the respondents, it follows that the two *status*, *vis.*, that of the occupancy raiyat and that of the raiyat holding at a fixed rate would exist in the same person and at the same time.

It follows therefore from this that it is not impossible for one person to have in respect of the same land and at the same time a right of occupancy, and the right of a raiyat holding at a fixed rate. In other words the two *status* may exist in the same person at the same time, even though the incidents of the two kinds of holdings may be diverse in character.

It was however contended, as already stated, that if the status of the raiyat was that of a raiyat at a fixed rate from the inception of his tenancy, as in this case, he could not subsequently acquire a right of occupancy so as to be protected under section 160 of the Bengal Tenancy Act.

It seems to me however that if a right of occupancy can be acquired by a raiyat, who already holds as a raiyat at a fixed rate, there is no reason why he should not be protected as to his right of occupancy under section 160, just as much as a person who has acquired a right of occupancy in the first instance and who subsequently obtains a grant at a fixed rate. The difference is merely in the method of acquisition. In the case of a person acquiring the right of occupancy in the first instance and obtaining the right of a raiyat at a fixed rate subsequently, it is admitted that he has a protected interest under section 160, so far as the right of occupancy is concerned. If then the *Raiyat* has in the first instance the right

(1) (1917) 27 C. L. J. 284 (288).



of a raiyat at a fixed rate, and if he subsequently can acquire and does acquire a right of occupancy, I see no reason why he should not be equally protected under section 160.

But it was urged on behalf of the respondents, and this was the real point of the learned vakil's argument, that a raiyat having the higher status of a raiyat at a fixed rate, cannot subsequently acquire the lower status of a right of occupancy. In my judgment this argument should not be accepted.

Section 20 is part of the Chapter dealing with occupancy raiyats; but it is to be noted that the word 'raiyat' is used in that section without any qualification. Under that section, if a person has held land situate in the village for a period of twelve years before or after the commencement of the act continuously "as a raiyat" he is to be deemed to have become on the expiration of that period a settled raiyat of the village.

What are the rights of a "settled raiyat of the village?"

That is made clear by section 21, which provides as follows:—

"Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village." So that when a raiyat becomes a settled raiyat of a village he has a right of occupancy in all land for the time being held by him as a raiyat in that village.

It is not disputed that these sections apply to the land in question in this suit but as already stated, it was urged that inasmuch as the plaintiff's interest was in its inception that of a raiyat at a fixed rate, he could not obtain a right of occupancy under section 21. I see no reason for limiting the general words of sections 20 and 21 in this way and in my judgment by reason of the terms of these sections and the plaintiff's undoubted holding of the lands in question for more than 12 years continuously, the plaintiff did acquire a right of occupancy therein.

Reference was made to clause (f) of section 160. It does not seem to have been considered in any of the previous cases. It provides as follows:—"Any right conferred on an occupancy raiyat to hold at a rent which was a fair and reasonable rent at the time of the right was conferred."

It was admitted by both the learned vakils that "the rent" referred to in this clause must be a "fixed" rent. This clause therefore is material as showing that the Legislature did contemplate that a person might have at the same time not only a right of occupancy but also the right of a raiyat at a fixed rent, and that

CIVIL.

1921.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Sanderson C. J.

CIVIL.

1920.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Sanderson C. J.

provided the rent was a fair and reasonable rent at the time the right was conferred not only the right of occupancy would be protected, but the right to hold at that fixed rent also would be protected.

Each of the learned vakils relied on the clause as being in his favour.

The learned vakil for the respondents, while admitting that the clause went to show that the Legislature had recognised the possibility of the existence of a right of occupancy and the right of a raiyat to hold at a fixed rent in one and the same person at the same time, contended that if the Legislature had intended to protect any part of the interest of a raiyat at a fixed rate, who had subsequently become an occupancy raiyat, it would have stated so expressly and therefore it was only the raiyat, who could bring himself within the express words of clause (f), who would be protected.

On the other hand, the learned vakil for the appellant urged that the intention of the Legislature was that every right of occupancy, no matter how it was acquired should be protected, and that it was further intended to protect not only the right of occupancy but also the right of the occupancy raiyat to hold at a fixed rent, provided it could be shown that such rent was fair and reasonable at the time the right to hold at the rent was conferred. In my judgment the latter is the preferable construction to place upon the clause; it seems to be an intelligible and reasonable construction.

This however is not conclusive of the case and I do not base my judgment thereon. For the reasons hereinbefore mentioned and on the above-mentioned facts, in my judgment, the plaintiff had acquired, in addition to his right to hold at a fixed rent, a right of occupancy, and such right of occupancy was protected under section 160 of the Bengal Tenancy Act. The result therefore is, in my judgment, that the learned Munsif was right in holding that so far as the plaintiff's right of occupancy was concerned, it was a protected interest and could not be annulled by the notice which was given by the defendant No. 3. The plaintiff consequently had not lost his right of occupancy in the land in suit, and the defendants 1 and 3 had no right to deprive the plaintiff of his share of the crops in question.

In my judgment this appeal should be allowed, the decree of the lower appellate Court should be set aside and the decree of the learned Munsif should be restored: The respondents must pay the appellants' costs in this Court and in the lower appellate Court.

**Richardson, J. :** I agree. The subject over which discussion has ranged is whether and to what extent the interest of a raiyat at a fixed rate, who has occupied his holding for a continuous period of more than twelve years, is a "protected interest" within the meaning of section 160 of the Bengal Tenancy Act. It is not denied that such an interest, except so far as it is protected, is an "incumbrance" within the meaning of section 161. Under section 159, a purchaser of a tenure sold under the Act in execution of a decree for arrears of rent takes subject to "protected interest" but with power to annul "incumbrances." The protected interests specified in section 160 include :—

(d) Any right of occupancy" and

(f) Any right conferred on an occupancy raiyat to hold at a rent which was a fair and reasonable rent at the time the right was conferred."

The principal question in dispute is whether a raiyat at a fixed rate may become a settled raiyat of the village under section 20 of the Act and thus acquire a right of occupancy within the meaning of section 21.

The discussion must begin with the fact that a raiyat holding at a fixed rate is a "raiya" and is so classified in section 4 of the Tenancy Act. Raiyats are there divided into three classes, the first being "(a) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity". The other two classes are "(b) occupancy raiyats, that is to say, raiyats having a right of occupancy in the land held by them" and "(c) non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy."

Chapter IV of the Act is entitled "Raiyats holding at fixed rates" and consists of one section, section 18, which marks out the two special incidents of the status of such a raiyat. Firstly, he is to be "subject to the same provisions with respect to the transfer of, and succession to, his holding as the holder of a permanent tenure" and secondly, he "shall not be ejected by his landlord, except on the ground that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected."

Now, stopping there, in my opinion, it might plausibly be contended that the second incident amounts in itself to a statutory right of occupancy, because it protects the raiyat at a fixed rate from eviction except on one specified ground. What is the statutory right of occupancy unless it is the protection from eviction

CIVIL.

1921.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

CIVIL.

1921.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Richardson, J.

which the Act gives to a raiyat? The status of an occupancy raiyat in respect of his right of occupancy is similarly described in section 25. The occupancy raiyat is merely protected from eviction except on two specified grounds, the first of which is "that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy" and the second is the very ground on which a raiyat at a fixed rate may be evicted. The latter, therefore, would seem to enjoy under the Act a superior right of occupancy. He can be evicted only on one ground, while the occupancy raiyat may be evicted on either of two grounds.

It is true that a permanent tenure-holder is also protected from eviction save on the one ground on which a raiyat at a fixed rate may be evicted (section 10). But a tenure-holder cannot claim a right of occupancy; the term is applicable only to raiyats, raiyats being regarded as the actual occupiers and cultivators of the soil. A non-occupancy raiyat also receives some measures of protection (section 44) but has no permanent right. The right of occupancy is a permanent right which the law guarantees to certain raiyats. *Prima facie* it seems anomalous that raiyats of a superior status should not, while raiyats of an inferior status should possess that right.

If it be that a raiyat at a fixed rate has a right of occupancy under section 18, the discussion ends there. But it would be unsafe to act on a view which, so far as I am aware, has not previously been suggested and is contrary to the assumption generally made. The point as I have said was not argued nor is it necessary for the purpose of the present case to say that a raiyat at a fixed rate has *ipso facto* a right of occupancy, inasmuch as the plaintiff has continuously held his land for a period of more than twelve years.

I will assume therefore that while the Bengal Tenancy Act by section 19 saves rights of occupancy acquired before November, 1885, when the Act came into force, since that date a right of occupancy in the strict or statutory sense can only be acquired (apart from custom) in the manner provided by sections 20 and 21. Those sections with section 19 will be found at the beginning of Chapter V under the heading "Occupancy Raiyats" and the sub-heading "General".

Now, reverting to the classification of raiyats in section 4, no doubt when a non-occupancy raiyat acquires a right of occupancy as he undoubtedly may, he ceases to be a non-occupancy raiyat. That must be so by force of the terminology. But inasmuch as it

is conceded that an occupancy raiyat may (without losing his right of occupancy) become a raiyat at a fixed rate; there appears to be no reason why a raiyat at a fixed rate, if he has not already a right of occupancy, should not be able to acquire such a right in addition to his other rights. I am not convinced that the status of a raiyat at a fixed rate cannot be satisfactorily or logically combined with that of an occupancy raiyat. The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extended. For instance, as regards eviction, an attempt to evict a raiyat possessing the combined rights on the ground that he had used the land so as to make it unfit for the purposes of the tenancy would be met by the plea of "raiyat at a fixed rate." The same answer would be given to a claim by the landlord to enhance the rent. No objection can be taken to the transfer of the holding of a raiyat at a fixed rate on the ground that the consent of the landlord has not been obtained, though the question might arise whether the transferee has obtained in virtue of the transfer a right of occupancy. It may well be that under the Tenancy Act a raiyat at a fixed rate is for all purposes other than a sale of the tenure under which he holds for arrears of rent sufficiently protected whether he has a right of occupancy or not. But I fail to see why merely on account of the other rights which he possesses he should be denied the protection which a right of occupancy would give him in the event of such a sale.

If there is nothing inherently contradictory or impossible in the combination of the two statuses, then, if we turn to sections 20 and 21, we find it provided, in section 20, that "every person who for a period of twelve years.....has continuously held as a raiyat land situate in any village.....shall be deemed to have become on the expiration of that period, a settled raiyat of that village", and, in section 21, that "every person who is a settled raiyat of a village.....shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

The language is certainly wide enough to cover the case of a raiyat at a fixed rate. No doubt, these sections occur in a Chapter headed "Occupancy Raiyats," but they deal with the acquisition of rights of occupancy. The expression 'land held as a raiyat' in section 20 must include land held as a non-occupancy raiyat. Why should it not include land held as a raiyat at a fixed rate? It is nothing to the purpose to say that the word 'raiyat' in section

CIVIL

1921

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Richardson, J.

CIVIL,

1921.

Sarbeswar

Maharaja  
Bejoy Chand.

Richardson, J.

85 does not include a raiyat at a fixed rate. The Act has to be construed as a whole, and in the case of a raiyat at a fixed rate, section 85 has to be read with section 18 and construed accordingly. Apart from the rights of transfer conferred or recognised by section 18, the word 'raiya' in section 85 would include a raiyat at a fixed rate.

Then, if a raiyat at a fixed rate may and does acquire a right of occupancy under sections 20 and 21, he will become for certain purposes at any rate an occupancy raiyat and will be entitled to protection as such under section 160 of the Act.

Otherwise a raiyat at a fixed rate would be entitled to no protection at all under section 160 unless he was entitled to a right of occupancy acquired before the Tenancy Act came into force. He does not hold an under-tenure and cannot claim the protection given to under-tenures. As Banerjee, J. said in *Nilmani v. Mathura* (1) section 18 "does not make all the incidents of a permanent tenure applicable to a raiyat's holding at fixed rates, but makes only the provisions with respect to transfer and succession applicable."

In any case, the protection which section 160 gives a raiyat at a fixed rate is a qualified protection—Assuming that his status does not as such entitle him to a right of occupancy, then, unless he otherwise has, or until he has acquired a right of occupancy, he is not protected at all. If he has a right of occupancy, that right is protected by clause (d) while his right to hold at a fixed rate, if protected at all, is only protected to the extent indicated in clause (f).

Clause (f) does not appear to have been considered in any previous case. The question was put in the course of the argument whether the clause has any meaning unless it refers to the rent of a raiyat at a fixed rate who is also an occupancy raiyat. No satisfactory reply was received. It was suggested for the respondent landlord that the words referred to an ordinary occupancy raiyat who has acquired the right to hold at a fixed rate. But, as already stated, if an occupancy raiyat can acquire the status of a raiyat at a fixed rate and keep his right of occupancy, there can be no reason why a raiyat at a fixed rate should not acquire a right of occupancy, and, if so, it would seem to be an unduly narrow construction to say that the clause only applies where the right to hold at the rent was conferred on a person who was at the time an occupancy raiyat.

(1) (1900) 5 C. L. J. 413.

and has no application where the raiyat at a fixed rate subsequently acquires a right of occupancy.

It was suggested also that an occupancy raiyat who acquires the right to hold at a fixed rate occupies a position midway between that of an occupancy raiyat and that of a raiyat at a fixed rate. But if that is not the previous suggestion in another form, I can find no justification for it or for saying that the classification in section 4 is not a complete classification. An occupancy raiyat who acquires the right to hold at a rent or rate of rent fixed in perpetuity is a raiyat at a fixed rate.

In the absence of all previous discussion on the topic, I am not prepared to say that clause (f) can only refer to a rent which has been permanently fixed. It has occurred to me that inasmuch as the interest of an occupancy raiyat so far as it is not protected, is an incumbrance and apart from clause (f) only the right of occupancy is protected, the words would cover the case of an ordinary occupancy raiyat, holding at a rent which apart from the sale for arrears could not have been altered for fifteen years from the date on which it was fixed [See sections 29 (c), 37 and 40-A]. It is also conceivable that an occupancy raiyat might by agreement have the right to hold for a limited period at a stated rent.

However that may be, if a raiyat at a fixed rate may and does acquire a right of occupancy and become for some purposes an occupancy raiyat, the words, whatever other application they may have, seem capable of being understood as protecting his rent provided it was a fair and reasonable rent at the time the right to hold at that rent was conferred.

This question of rent, however, does not arise in the present case in which the raiyat is the plaintiff in an action sounding in tort and I refrain, therefore, from expressing a final opinion on the meaning of clause (f). I will only add that in the view of its meaning which I have indicated as a possible view, clause (f) would be the counterpart of such a saving clause as that contained in section 11 of the Patni Taluks Regulation (Regulation VIII of 1819) and in section 16 of the Bengal Rent Recovery (Under-tenures) Act of 1865 (Bengal Act VIII of 1865). Section 16 lays down that "the purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances" subject, *inter alia*, to the proviso (which follows the third clause of section 11 of the Regulation) "that nothing herein contained shall be held to entitle the purchaser to eject khudkast raiyats or resident and hereditary cultivators nor to cancel *bona fide* engagements made with such class of raiyats

CIVIL.

1921.

Sarbeswar

v.

Maharaja  
Bejoy Chand.

Richardson, &amp;

CIVIL.

1921.

Sarbeswar

v.  
Maharaja  
Bejoy Chand.

Richardson, J.

or cultivators aforesaid by the late incumbent of the under-tenure or his representatives except it be proved, in a regular suit, to be brought by such purchaser for the adjustment of his rent that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

In the old days the khudkhasht raiyat, or resident cultivator, holding at the customary pergunah rate, was distinguished from the paikasht raiyat, or non-resident cultivator, who was a tenant-at-will or tenant from year to year. The distinction was largely obliterated by the Bengal Rent Act (Act X of 1859) which introduced the new division of occupancy and non-occupancy raiyas and enabled the paikasht raiyat to acquire the privileges or many of the privileges of the khudkhasht raiyat. The khudkhasht raiyat, however, still survives in the enactments to which I have just referred and no doubt at the present day every occupancy raiyat would be regarded as a khudkhasht raiyat [Cf. *Sheikh Mahomed v. Shamshir Ali* (1)].

The Bengal Tenancy Act merely develops the policy of Act X of 1859 and the question occurs whether there is anything in the history of the subject to suggest that a raiyat at a fixed rate should be disabled from acquiring the right of occupancy.

It is clear from sections 3 to 6 of Act X that the Act regarded raiyats who had held their land at a rent unchanged from the time of the permanent settlement as occupancy raiyats. Under section 3, "Raiyats who hold lands at fixed rates of rent which have not been changed from the time of the permanent settlement" were to receive pattas at those rates. Section 4 was a provision corresponding to clause (2) of section 50 of the Tenancy Act. Under section 5, "Raiyats having rights of occupancy but not holding at fixed rates, as described in the two preceding sections" were to receive pattas at fair and equitable rates. Section 6 provided:—"Every raiyat who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, so long as he pays the rent payable on account of the same." That includes raiyats of the class mentioned in section 3.

It was then found that in improving the condition of the paikasht raiyat some injustice had been done to the khudkhasht raiyat. Before Act X the latter would have had what I will call a permanent right of occupation in respect of all land held by him in his village irrespective of the period during which he had held any particular parcel. As section 6 worded the right of occupancy could only be acquired in land which had been actually occupied for



the period of twelve years : *Sarat Chandra Roy Chowdhry v. Asiman Bibi* (1).

CIVIL.  
1911.  
Sarbeswar  
v.  
Maharaja  
Bejoy Chandra  
Richardson, J.

This grievance was remedied by sections 20 and 21 of the Tenancy Act under which the raiyat has a right of occupancy in all lands in the village of which he is a settled raiyat and he is a settled raiyat of the village if for a period of twelve years he has continuously held as a raiyat land situate therein.

Now the Tenancy Act does in section 50 clause (1) recognize that where a "raiyat" and his predecessors-in-interest have held at a rent or a rate of rent which has not been changed from the time of the permanent settlement, the rent cannot be increased except on the ground of an alteration in the area of the tenure or holding. That corresponds to section 3 of Act X, while clause (2) of section 50 corresponds, as I have said, to section 4 of Act X. A raiyat who proves that he holds at a rent unchanged since 1793 is under the Tenancy Act, as under Act X, a raiyat holding at a fixed rate. See *Dulhin Golab Koer v. Balla Kurmi* (2). But he is not specially protected under section 160 of the former Act. If the correct view be that a raiyat at a fixed rate cannot acquire a right of occupancy under the Tenancy Act, the raiyat holding at a rent unchanged since 1793 is only protected because his right of occupancy was acquired under Act X of 1859 and is preserved by section 19 of the Tenancy Act. Section 19 is a section of the kind which legislature insert out of caution to preserve existing rights. I can see no reason for saying that though a raiyat holding at a rent unchanged since 1793 had a right of occupancy under Act X, nevertheless under the Tenancy Act, apart from section 15, he has no right of occupancy.

It is true that Act X put on the same footing all raiyats who did not hold their land at a rent unchanged from the time of the permanent settlement, treating them all (whether holding at a fixed rent or not), as occupancy raiyats after twelve years of possession, liable to pay a fair and equitable rent: *Dinobundhoo v. Ram Dhone* (3). But it must be remembered that ever since Regulation V of 1812 zamindars in permanently settled districts have been considered competent to grant leases to raiyats at a fixed rent for any term or in perpetuity, and that since then such leases have been binding upon the grantors, their heirs and assigns though not upon a purchaser under a sale for arrears of revenue: *Isshur Ghose v. Hills* (4).

(1) (1904) 1 L. R. 31 Calc. 725 (730, 731).

(2) (1888) 1 L. R. 25 Calc. 744.

(3) (1868) 9 W. R. 522. (4) (1864) W. R. F. B. Rule 138 (153).

CIVIL.

1921.

Sarbeswar

Maharaja  
Bejoy Chand.

Richardson, J.

Presumably while such a lease was in force the fair and equitable rent would have been the rent payable under the lease. The fact, therefore, that under the Tenancy Act raiyats who hold at fixed rates but not under tenancies dating from 1793 are included in the definition of raiyats holding at fixed rates seems to furnish no reason why such raiyats should be excluded from the benefit of sections 20 and 21. Here again there are raiyati tenancies created after 1793 the holders of which are entitled to rights of occupancy acquired under Act X and preserved by section 19 of the Tenancy Act. *Lakhi Charan Saha v. Hamid Ali* (1).

Suppose this case, a raiyat holds land in a village as a settled raiyat with the right of occupancy. He surrenders the land and takes other land in exchange as a raiyat at a fixed rate. Is he to lose the right of occupancy which he would otherwise have in the land taken in exchange?

Having referred to the repealed Act X of 1859 I should perhaps explain that I quite appreciate that the right of occupancy is a creature of statute and that at the present time the solution of any question as regards the scope or incidents of that right must be sought within the four corners of the Bengal Tenancy Act. But where that Act speaks with an uncertain or ambiguous voice, I apprehend that resort may be had to the previous history of the subject for light and guidance in construing its provisions.

If Act X of 1859 has been repealed, Act XI of that year (the Bengal Land Revenue Sales Act) is still in force and questions have arisen in regard to the meaning of the proviso to section 37. One, at least of these questions is germane to the present discussion and some reference to the section must therefore be made. Under section 37 a purchaser of an estate sold for arrears of land-revenue acquires it free from all incumbrances with certain exceptions and subject to the proviso which protects from ejection "any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force". The proviso goes on to say that the purchaser is not "to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

The language of the proviso seems to reflect the provisions contained in sections 3 to 6 of Act X of 1859. All raiyats having a right

CIVIL.

1921.

Sarbeswar

v

Maharaja  
Bejoy Chand.

Richardson, J.

of occupancy under that Act were protected from ejectment. Where the rent of a holding had not been changed since 1793, it was protected from enhancement but the rent of occupancy raiyats including occupancy raiyats at a fixed rate holding under "engagements made since the time of settlement" became liable to enhancement under the laws in force irrespective of those engagements. That result was also consistent with the state of things brought about by Regulation V of 1812 referred to above.

No difficulty occurred till Act X was repealed and the Bengal Tenancy Act was passed. The proviso had then to be construed with reference to the provisions of the latter Act.

It was held in *Sarat Chandra's case* (1) to which I have already referred, that the right of occupancy mentioned in the proviso must now be equated with the right of occupancy defined in the Tenancy Act. (See per Mitra, J., at page 731 and per Geidt, J. at page 736). There are not two rights of occupancy, one created by Act X and a separate and different right created by the Tenancy Act. The Tenancy Act enlarges the mode of acquisition but it is in part a consolidating Act and the right when acquired is identical with the right of occupancy created by Act X. Mitra and Geidt, J.J., therefore held that the ordinary occupancy raiyat was entitled under the proviso to protection for all the lands held by him as a settled raiyat. The decision is an interpretation with reference to the Tenancy Act of the words "any raiyat having a right of occupancy at a rent assessable according to fixed rules under the laws in force" and is now accepted law.

The more difficult question remained as to the meaning with reference to the Tenancy Act of the words "any raiyat having a right of occupancy at a fixed rate."

As I said at the outset, personally I am tempted to hold that every raiyat at a fixed rate has a right of occupancy as an incident of his status, however the status be acquired. But if that is inadmissible, the reasonable conclusion seems to me to be this, that the words now include every raiyat at a fixed rate who apart from his status as such possesses or has acquired a right of occupancy. That would include every settled raiyat of a village who in respect of the holding in connection with which the question arises is a raiyat at a fixed rate. Such a raiyat would be protected from ejectment but might be liable under the laws in force to enhancement of rent on the ground that he holds "under an engagement made since the time of settlement."

(1) (1904) 1. L. R. 31 Calc. 725.

CIVIL.

1921.

Sarbeswar

v.

Maharaja —  
Bejoy Chand.

Richardson, J.

The concession to which I referred earlier in this judgment—that an occupancy raiyat who becomes a raiyat at a fixed rate has a right of occupancy protected by clause (d) of section 160 of the Tenancy Act—was probably made in view of the terms of the proviso to section 37. The argument is that an ordinary occupancy raiyat who acquires the status of a raiyat at a fixed rate does not lose his right of occupancy because there is no merger, and that his right of occupancy is therefore protected both by clause (d) of section 160 and by the proviso to section 37. In my opinion, however, for the reason already stated, it is impossible to stop at any such half-way house.

The question whether a raiyat at a fixed rate whose tenancy began after the Bengal Tenancy Act came into force and has lasted for twelve years or more has or has not a right of occupancy which is protected by the proviso to section 37 is in substance much the same as the question which arises in the present case, whether such a raiyat has a right of occupancy protected by clause (d) of section 160. Both questions depend on the further question whether such a raiyat can or cannot become a settled raiyat of the village within the meaning of sections 20 and 21 of the Tenancy Act.

It will be apparent from what I have said that I am disposed to answer this last question in the affirmative. The cases have already been referred to by the learned Chief Justice and in my opinion there is no authority which precludes me from giving effect to the view which I have formed.

The principal difficulty is caused by the observations of Mookerjee, J. in *Bhur Nath Naskar v. Manmatha Nath Mitra* (1). Those observations are entitled to great respect and naturally make me much more doubtful as to the correctness of my own view than I should otherwise have been. The case however was actually decided on another ground and for the present purpose therefore is not conclusive. Second Appeal No. 847 of 1913 decided on 26th May, 1915, turned on the proviso to section 37 of Act XI of 1859 and the case does not appear to have been presented in argument to the learned Judges on the lines on which the present case has been presented to us.

In the result I agree that the appeal should be allowed.

A. T. M.

*Appeal allowed.*

(1) (1909) 11 C. L. J. 98; 13 C. W. N. 1025.

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice,  
and Sir Ernest Edward Fletcher, Knight, Judge.*

HURMUKHROY RAM CHUNDER

v.

THE JAPAN COTTON TRADING CO. LD.\*

*Award—Bad not separable from good—Arbitrators making award on grounds, some of which are bad—No proof that arbitrators acted exclusively on grounds within their jurisdiction.*

If the bad is not separable from the good, the whole is bad.

An award made by arbitrators on grounds some of which did, while the others did not, justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators acted exclusively on grounds within their jurisdiction, the award is null and void: *Shipworth v. Shipworth* (1) and other cases referred to.

Appeal by the Opposite Party:

Application by the Respondent to set aside an award made by the Bengal Chamber of Commerce Arbitration Tribunal.

The material facts appear from the judgment of Mookerjee, A. C. J.

An award was made by the Bengal Chamber of Commerce Arbitration Tribunal on the 18th July, 1919. An application was made by the respondent to set aside that award. Mr. Justice Greaves directed the award to be taken off the file by the following judgment:

**Greaves, J.**—In this case the terms of submission to the Bengal Chamber of Commerce were as follows:—"That the goods are not in terms of the contract and are not covered thereby; all these goods and similar goods were originally sold by the importing firm to Sukdeo Ramprosad their banian firm. After such sale how can the importing firm sell these goods to other parties treating such goods as the property of the importing firm. Contract shipment not proved and it is not proved that the quantity of goods sold here had been purchased and provided for in Japan: others are in the statement here-under." It seems to me having regard to the terms of the reference set forth in the document to which I have just referred and the other materials which were before the Arbitration Tribunal of the Bengal Chamber of Commerce that the matters in dispute did not fall within the arbitration clause contained in the

\* Appeal from Original Order No. 47 of 1920, against an order of Mr. Justice Greaves, dated the 8th March, 1920.

(1) (1846) 9 Beav. 135.

CIVIL.

1920.

June, 14, 1920.

March, 8.

CIVIL.

1920.

Hurmukhroy

The Japan Cotton  
Trading Co. Ltd.

Greaves, J.

contract. According to the construction I have put upon the clause in the judgments delivered by me with regard to Award Nos. 150, 151 and 152, I think that my construction of contract there stated governs this case and that this case must stand or fall by that judgment. In the result the application succeeds. I declare the award to be null and void and I direct it to be taken off the file and also direct Mr. Mazumdar's client to pay the costs of this application.

Against this order, the Opposite Party to the application appealed.

*Sir A. Chaudhury* and *Mr. M. N. Bose* for the Appellants.

*Mr. A. N. Chaudhury* for the Respondents.

The judgments of the Court were as follows :

June, 15.

**Mookerjee A. C. J.**—This is an appeal from a judgment of Mr. Justice Greaves, in which he has held, on an application by the respondents, that the award made against them by the Bengal Chamber of Commerce Arbitration Tribunal on the 18th July, 1919, at the instance of the appellant, is null and void. The contract between the parties was made on the 1st August 1918 for the sale of "19 bales of sheeting No. 3841, 36" by 38 yards at Rs. 10-12-0 per piece; shipment November and December 1918, delivery within 60 days from the date of arrival, payment cash, 2 months' late shipment accepted."

The contract contained an arbitration clause in these terms: "Any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance, to be referred, at seller's option, to the Bengal Chamber of Commerce or other Arbitration Tribunal, as specified thereunder." The question of the true scope of this clause came up for consideration by this Court in the case of *Chandanmull Goneshmull v. Nippon Munkani Kabishahi Kaisha* (1). We were then disposed to hold that Mr. Justice Greaves had placed an unduly narrow construction upon the Arbitration Clause, especially as to the meaning of the words "difference" and "inferiority." In that case, however, it transpired that there had been no dispute between the parties such as would entitle one of them to invoke the aid of the arbitration clause. In the case before us, the buyer appellant had the matter referred to arbitration; and his grounds of complaint were stated in these terms: "That the goods are not in terms of the contract and are not covered thereby. All these goods and similar goods were originally sold by the im-

(1) (1920) A. O. O. No. 92 of 1919, heard on 17th February, 1920.

porting firm" to Sukdeo Ramprosad (their banians' firm): after such sale, how can the importing firm sell these goods to other parties, treating such goods as the property of the importing firm? Correct shipments are not proved and it is not proved that the quantity of goods sold here, had been purchased and provided for in Japan, others are in the statement hereunder."

It is plain that some of these grounds of complaint do fall within the scope of the arbitration clause; but it is equally clear that the other grounds are beyond the scope of the arbitration clause. Consequently, the true position is that the appellant invoked the aid of the arbitrators on grounds some of which did, while the others did not, justify the exercise of their jurisdiction. When the matter went before the arbitrators, they delivered an award, which set out the grounds of complaint (as mentioned above) and then proceeded to formulate the decision: "We have carefully examined all evidence put before us and award cancellation of contract. Messrs. the Japan Cotton Trading Co. Ltd. sellers, shall pay to Messrs. Hurmukhroy Ram Chunder, buyers, the costs of this arbitration amounting to Rs. 125." It will be observed that the award does not state either the facts found by the arbitrators or the grounds for their decision. It is consequently impossible for us to hold that the award proceeded solely on those grounds which entitled the arbitrators to exercise their jurisdiction under the arbitration clause, and not on any of the grounds which did not afford a basis for the exercise of that jurisdiction. Indeed, the fact that the complaints as summarised by the appellant are all set out as a preface to the award, indicates, *prima facie*, that the award is based on all the grounds. In these circumstances, when we cannot hold with certainty that the arbitrators acted exclusively on grounds within their jurisdiction, we must apply the principle that if the bad is not separable from the good, the whole is bad, and pronounce the award null and void: *Skipworth v. Skipworth* (1); *Storke v. De Suneth* (2); *Buckleuch v. Metropolitan Board of Works* (3); *Thorp v. Cole* (4).

The result is that the decree made by Mr. Justice Greaves is affirmed and this appeal dismissed with costs.

Fletcher, J.—I agree.

Mr. P. N. Sen: Attorney for the Appellants.

Messrs. Pugh and Co.: Attorneys for the Respondents.

Art. T. M.

Appeal dismissed.

(1) (1896) 9 Beav. 135.

(2) (1737-8) Willies 66.

(3) (1870) L. R. 5 Ex. 221.

(4) (1835) 2 C. M. and R. 367.

CIVIL.

1920.

Hurmukhroy

v.

The Japan Cotton  
Trading Co. Ltd.

Mookerjee, A. C. J.

## APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.  
Justice Buckland.

BEPIN KRISHNA RAY AND OTHERS

v.

JOGESHWAR RAY AND OTHERS.\*

CIVIL.

1921.

April, 25, 26.  
June, 14.

*Rectification—Mortgage deed—Misdescription—Specific Relief Act (I of 1877); Sec. 31—What to be proved—Reformation—Mistake in mortgage deed reproduced in decree, if can be rectified—Lis pendens—Notice—Notice to purchaser by title deed—Oral evidence, admissibility of—Negotiation, antecedent—Decision of Court, to rest on what—Unilateral mistake.*

The plaintiff who seeks the assistance of the Court under section 31 of the Specific Relief Act for the rectification of the written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing, this did not express or give effect to the agreement. The mistake must be mutual, that is, a mistake reciprocal and common to both parties. In other words, each must labour alike under the same misconception in respect to the terms of the written instrument.

In order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong.

Where the defendant is shown to have been aware not only that the instrument did not express the real agreement but also that the plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is one for reformation: *Clark v. Girdward* (1) and other cases.

Where there is unilateral mistake, rectification is refused.

If there is a mutual mistake in a mortgage deed in the description of property and the same mistake is reproduced in the decree which is not resulted in sale in execution thereof, equity may go back to the original transaction and reform both the mortgage deed and the decree so as to make them conform to the intention of the parties concerned.

Misdescription of property involved in a litigation is sufficient to render the doctrine of *lis pendens* applicable in the case of a person having knowledge or notice of the true state of things: *Lokenath v. Achitananda* (2).

In the case of a mortgage suit the *lis pendens* does not terminate till the security has been realised for the satisfaction of the judgment debt: *Surjiram v. Barhamdeo* (3) and other cases.

\* Appeal from Original Decree No. 153 of 1919, against the decree of Babu Krishna Kumar Sen, Additional Subordinate Judge of Hooghly, dated the 3rd March, 1919.

(1) (1877) 7 Ch. D. 9. (2) (1915) 15 C. L. J. 391.

(3) (1905) 2 C. L. J. 288.



The conception of notice was introduced in law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is therefore in its essential nature inferior to knowledge.

Whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as a substitute has been more accurately accomplished in another manner.

If the party has in any way obtained the full knowledge, those same results must necessarily and even in a higher degree, be attributed to it—the very substance itself—which are, from motives of general policy, attributed to notice as its representative and substitute.

Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link.

Oral evidence is admissible as to negotiations antecedent to the execution of the mortgage instrument, showing what was intended to be offered and accepted as security was a certain ancestral share of the mortgagor in the original estate which at the time of the mortgage was part of the separate account: *Balkishan v. Legge* (1) and *Giwraj v. Norwich Assurance Co.* (2).

The decision of the Court should rest, not upon suspicion but upon legal grounds established by legal testimony: *Mina Kumari v. Bejoy Singh* (3) and *Muhammad Mahbub Ali v. Bharatindu* (4).

Appeal by Defendant No. 8.

Suit for rectification of mortgage deed and for incidental relief.

The material facts appear from the judgment.

*Babus Dwarka Nath Chuckerbutty* and *Kali Kinkar Chuckerbutty* for the Appellants.

*Babus Ram Chunder Mozumdar*, *Rupendra Kumar Mitter* and *Monmohan Bose* for the Respondents.

C. A. V.

The judgments of the Court were as follows:

**Mookerjee, J.**—The subject matter of the litigation which has culminated in this appeal is a share of an estate which bore Tauzi

CIVIL.

1921.

Bepin Krishna  
Jogeshwar.

June, 14.

(1) (1899) L. R. 27 I. A. 58; I. L. R. 22 All. 149 (158).

(2) (1905) 5 Bom. L. R. 853.

(3) (1916) L. R. 44 I. A. 72; I. L. R. 44 Calc. 662; 25 C. L. J. 508.

(4) (1918) 23 C. W. N. 321.

CIVIL.

1921.

Bepin-Krishna

v.

Jogeshwar.

Mookerjee, J.

No. 93 on the revenue roll of the Collector of Hughli about the middle of the last century and was held by two proprietors Ramsundar Bose and Harachandra Bose. The amount of revenue originally payable was fixed at Rs. 2998-1-10; this was subsequently reduced to Rs. 2971-1-11 when part of the estate was acquired for public purposes under the Land Acquisition Act. On the 29th September, 1864, upon an application made under section 10 of Act XI 1859, the share of Harachandra Bose which amounted to 8 as. 16 gds. of the entire estate (treated as 16 as.) was formed into a separate account and was described in the books of the Collector as Tauzi No. 93A with proportionate amount of revenue payable fixed at Rs. 1648-15-5. Thenceforward Tauzi No. 93 became what is termed the residuary share and included only a 7 as. 4 gds. share of the original estate which was vested in Ramsundar Bose. To put the matter briefly, before the separate account had been opened under Sec. 10 of the Revenue Sale Law the expression Touzi No. 93 would be the fitting description of the entire estate, but since the opening of the separate account was sanctioned by the Collector, the term Tauzi No. 93 could be appropriately used to specify only the residuary share 7 as. 4 gds. of Ramsundar Bose, while the term Tauzi No. 93A could be properly used to designate only the separated share 8 as. 16 gds. of Harachandra Bose. It is necessary to mention at this stage that Harachandra Bose left four sons, Kailas Chandra, Makhantal, Benilal and Brajalal each of whom inherited one-fourth of his properties, that is, each took a 2 as. 4 gds. share out of the 8 as. 16 gds. share which belonged to their father. It also transpires that these four brothers acquired from the representatives of Ramsundar Bose, 1 anna. 13 gds. 1 ka. 1 kr. share (out of the 7 as. 4 gds. share), namely, 1 anna. 1 gd. 1 ka. 1 kr. share by a conveyance dated 19th September, 1862, an 8 gds. share by another conveyance dated 9th September, 1873, and a 4 gds. share at an execution sale. Each of the four sons of Harachandra Bose thus acquired, in addition to his ancestral share 2 as. 4 gds. in Tauzi No. 93A, one-fourth of 1 anna 13 gds. 1 ka. 1 kr. share, that is, an 8 gds. 1 ka. 1 kr. share in Tauzi No. 93. The shares thus vested in Benilal Bose (the third son of Harachandra Bose) in the two Tauzis mentioned, passed on his death to his son Ramchandra Bose, the predecessor in interest of the first seven defendants in the present litigation. We now come to three transfers effected by Ramchandra Bose, which are of vital importance in the determination of the questions in controversy in this suit.

On the 7th February, 1903 Ramchandra Bose executed in favour

of Jagadiswar Ray, the predecessor in interest of the plaintiffs in the present litigation, a mortgage bond to secure a loan of Rs. 5999; the property hypothecated was described as his own share of 2 as 4 gds, which his father had possessed in "Tauzi No. 93". It will be observed that although the share inherited by the mortgagor from his father was originally included in Tauzi No. 93 (which comprised the whole estate), at the date of the mortgage that Tauzi had been broken up into two fragments, namely, Tauzi No. 93 A (which was the separate account and included the ancestral share of the mortgagor) and Tauzi No. 93 (the residuary estate which included only the share of Ramchandra Bose). Consequently, if what was intended to be mortgaged was the ancestral 2 as 4 gds. share of the mortgagor, the description that it was a share of "Tauzi No. 93" (which, at the date of the transaction, had not the same connotation as it had prior to the opening of the separate account) might well lead to confusion. Indeed, as will presently appear, this has been the root of the present litigation.

The next document, executed by Ramchandra Bose which deserves attention is a conveyance dated the 11th April, 1911 in favour of Bipin Krishna Ray the eighth defendant in the present litigation. This deed of absolute sale recites in full the history of the estate No. 93 and explains how the separate account Tauzi No. 93A was carved thereout and the residuary estate Tauzi No. 93 was brought into existence. The document not only sets out the successive steps whereby the vendor had acquired an interest in both the Tausis,—in the former by right of inheritance and in the latter by right of purchase,—but further mentions that on the 20th April, 1868 a patni settlement was taken by Benilal Bose (one of the representatives of Harachandra Bose, the holder of the separate account Tauzi No. 93A) in respect of 1 anna, 1 gd. 1 ka. 1 kr. share out of the 7 as. 4 gds. share which constituted the residuary estate; this lease, though taken in the name of Benilal Bose, was apparently for the benefit of himself and his three brothers. The deed finally recites two incumbrances created by the vendor, namely, first, a simple mortgage to Jagadiswar Ray of the 2 as. 4 gds. share inherited by him from his father and comprised in Tauzi No. 93 A, and, secondly, a conditional mortgage dated 14th November 1909 in favour of J. F. Duncan of Calcutta, with respect to an 8 gds. 1 ka. 1 kr. share of his zemindary interest and 5 gds. 1 ka. 1 kr. share of his patni interest; these, as we have seen, were comprised in the residuary estate Tauzi No. 93. The conveyance, after these recitals proceeds finally to transfer to the purchaser, for a consideration of

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

CIVIL.

1921.

Biplin Krishna

v.

Jogeshwar.

Mookerjee, J.

Rs. 1000, the zemindari right in 8 gds. 1 ka. 1 kr. share of the original Tauzi No. 93, deducting the 2 as. 4 gds. share out of the 8 as. 16 gds. share of Tauzi No. 93A, and the patni right in the 5 gds. 1 ka. 1 kr. share, together with a 2 as. 17 gds. 2 ka. 2 kr. share in certain resumed chaukidari chakran (service) lands. It is plain from the elaborate recitals in this document that the vendor did not keep back from the purchaser any relevant information relating to the history of the title to the estate conveyed by him, and the purchaser was apprised how the original Tauzi No. 93 had been broken up into separate accounts, Tauzi No. 93A, (which was subject to the mortgage in favour of Jagadiswar Ray) and the residuary estate Tauzi No. 93 which was transferred in part to the purchaser, subject to the patni lease in favour of Benilal Bose and the mortgage in favour of Duncan.

The third document executed by Ramchandra Bose which requires examination is a conveyance dated 19th September, 1911, in favour of Bipin Krishna Ray the eighth defendant in this suit, and the transferee under the conveyance dated 11th April, 1911, whose provisions we have just analysed. This second conveyance purported to transfer the 2 as 4 gds share inherited by the vendor from his father and included in the separate account recorded as Tauzi No. 93 A comprising the 8 as 16 gds share originally held by Harachandra Bose (the grandfather of the vendor). The consideration was stated to be Rs. 5000 and the vendor declared that he had not encumbered the subject matter of the sale by mortgage or otherwise. This is remarkable in view of the statement in the previous conveyance of the 11th April, 1911 that this ancestral share of 2 as. 4 gds. had been mortgaged with Jagadiswar Ray. We shall now proceed to describe the succession of events which have brought the contesting parties into Court.

On the 13th August, 1909, the executors to the estate of Jagadiswar Ray (who had taken the mortgage of the 7th February, 1903) instituted a suit against the mortgagor Ramchandra Bose to enforce the security. The original mortgage bond was filed along with the plaint and in a schedule thereto the properties hypothecated were described as appertaining to lot Srirampore "bearing Tauzi No. 93; of the 16 as. share thereof defendant's own share is 2 as. 4 gds. and the proportionate annual revenue Rs. 412 for the said 2 as. 4 gds. share is payable into the Collectorate", as the annual revenue of the said mahal is Rs. 2972-1-10, payable into the Collectorate of Hughli. The suit was not defended, and on the 16th December, 1909 the usual mortgage decree was made, directing the sale of the

mortgage properties; the description copied from the mortgage deed and inserted in the schedule to the plaint was reproduced in the schedule to the decree. The decree-holders applied in due course for execution of the mortgage decree, the sale proclamation was issued and the bid of Rs. 5000 offered by the decree-holders was accepted on the 18th September, 1911. At that stage, the decree-holders appear to have discovered that the property sold had been described in the sale proclamation as Tauzi No. 93 and they seem to have apprehended that this might lead to future dispute as to what had actually been sold. They did not accordingly deposit the poundage fee and applied to the Court to resell the mortgage property after a fresh sale proclamation had been duly published. The petition embodied the following prayer :

" Be it declared that the property which had been mortgaged by the judgment-debtor was a 2 as. 4 gds. share of Tauzi No. 93 of the Collectorate of this District and the judgment-debtor having opened a separate account, the said 2 as. 4 gds. share is now included within Tauzi No. 93A. For this, the above 2 as 4 gds share of Tauzi No. 93A belonging to the judgment-debtor is liable to be sold by auction for the mortgage debt. The decree-holders pray that the sale proclamation to that effect may be published " On the 27th October, 1911, the judgment-debtor lodged his objection against the issue of a fresh sale proclamation in an amended form and urged that as Tauzi No. 93A had been formed, not after but before the mortgage, the proposed amendment would be contrary to the terms of the mortgage decree which was in exact conformity with the mortgage deed, whereby the mortgagor had hypothecated, not his interest in Tauzi No. 93 A but only such interest as he possessed at the time of the transaction in the residuary estate Tauzi No. 93. On the 3rd February, 1912, the matter came up for consideration before the execution Court. Meanwhile, the mortgagor had, as we have already seen, executed in favour of Bipin Krishna Ray the conveyance of 19th September, 1911, which purported to transfer to him the 2 as. 4 gds. share of the vendor in Tauzi No. 93A described as free from encumbrances. Bepin Krishna Ray accordingly intervened in the execution proceedings; he contended that his position could not be prejudiced by a summary order for amendment of the decree and the sale proclamation, and claimed the protection accorded to a *bona fide* purchaser for value without notice. The execution Court held that the remedy of the decree-holders was to obtain a rectification of the mortgage instrument and of the mortgage decree and that an amended sale

CIVIL.  
1921  
Bepin Krishna  
v.  
Jogeshwar.  
Mookerjee, J.

CIVIL.

1921.

Bepin Krishna

Jogeshwar.

Mookerjee, J.

proclamation could not be issued until such rectification had been made. The result was that on the 3rd February, 1912, the Subordinate Judge dismissed the application for sale of 2 as. 4 gds. share in Tauzi No. 93 A on the basis of an amended sale proclamation. On the 27th February, 1914, the executors to the estate of the mortgagee instituted the present suit for rectification of the mortgage dated 7th February, 1903, and for incidental reliefs. The first seven defendants were the representatives of the mortgagor Ramchandra Bose who had died in the interval in the early part of the year 1913, and the eighth defendant was Bepin Krishna Ray who had taken a conveyance from the mortgagor on the 19th September, 1911. The representatives of the mortgagor did not enter appearance and the claim was contested by the eighth defendant alone. The nature of the objections raised by him are indicated in the issues which were framed in the following terms :

1. Is the suit maintainable in its present form and have the plaintiffs any cause of action for the suit ?
2. Is the suit within time ?
3. Is the suit bad for misjoinder of parties and causes of action as well as non-joinder of necessary party ?
4. Are the plaintiffs estopped from asserting any lien on Tauzi No. 93A ?
5. Was the purchase by defendant No. 8 *bona fide* and for valuable consideration and are the plaintiffs estopped from questioning the validity of his purchase ?
6. Was the mortgage of the 24th Magh 1309 legally executed and for valuable consideration and was Tauzi No. 93A mortgaged or intended to be mortgaged by the said deed ? and was the defendant No. 8 aware of the said mortgage ?
7. Has the plaintiffs' lien been merged in the mortgage deed and has the lien been extinguished by the sale in execution of that decree ?
8. Can the plaintiffs get a decree for rectification as prayed for ?
9. What relief, if any, are the plaintiffs entitled to ?

The Subordinate Judge who tried the case in the first instance dismissed the suit as barred by limitation and did not express an opinion upon the merits. Upon appeal to this Court, Fletcher and Huda JJ. held that as the question of limitation was not apparent on the face of the record, the case should go to trial on all the issues that had been framed in the suit between the parties. The appeal was accordingly allowed and the case was remanded

for reconsideration. The Subordinate Judge has now held that the 2 as. 4 gds. share of Ramchandra Bose which at the date of the mortgage transaction was comprised in Tauzi No. 93A was really intended to be mortgaged; and that the contesting defendant was not a *bona fide* purchaser of that share for value without notice. In this view, the Subordinate Judge has decreed the claim in the following terms:

"It is declared that the 2 as. 4 gds. share in the mouzas Nij Serampur, Gangarambati and Habra in lot Serampur comprised in Tauzi No. 93A of the Hughli Collectorate owned by the deceased Ramchandra Bose was charged with the principal and interest on the mortgage bond dated 24th Magh 1309 and that the description of the property in the bond was erroneous and the property really intended to be mortgaged by it was the said share in Tauzi No. 93A; the mortgage bond and the decree in suit No. 103 of 1909 be rectified accordingly."

The contesting defendant has on the present appeal assailed the decision of the Subordinate Judge as erroneous both on the facts and the law. On his behalf, we have been pressed to hold that there is no satisfactory evidence to show that what was intended to be hypothecated by the mortgagor and to be accepted as security by the mortgagee was the 2 as. 4 gds. share held by the borrower Ramchandra Bose in the separate account Tauzi No. 93A. It has further been urged in support of the appeal that even if the alleged contract be established, the mortgage instrument cannot be rectified at this stage, after the security had merged in the decree, and the property had passed into the hands of a stranger who claimed to hold it as a *bona fide* purchaser for value without notice. The principles to be borne in mind in the determination of the questions thus raised are set out in section 31 of the Specific Relief Act;

"When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value."

The first point for consideration is, whether through a mutual mistake of the parties the mortgage instrument in this case does not

CIVIL.

1921.

Bepin Krishna

Jogeshwar.

Mookerjee, J.

CIVIL,

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

truly express their intention ; in other words, the plaintiffs who seek the assistance of the Court for the rectification of the written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing, this did not express or give effect to the agreement. As James, V. C. tersely expressed the substance of the matter in *Mackenzie v. Coulson* (1): " Courts of Equity do not rectify contracts, they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts." To the same effect are the observations of Chelmsford L. C. in *Fowler v. Fowler* (2): " The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow's language is very strong on this subject ; he says, " the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence ; " *Lady Shelburne v. Lord Inchiquin* (3). And this expression of Lord Thurlow is mentioned by Lord Eldon in *Marquis of Townshend v. Stangroom* (4) without disapprobation. If, however, Lord Thurlow used the word " irrefragable," in its ordinary meaning, to describe evidence, which cannot be refuted or overthrown, his language would require some qualification ; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground

(1) (1869) L. R. 8 Eq. 368.

(2) (1859) 4 DeG. and J. 250 (164).

(3) (1784) 1 Br. Ch. Ca. 388 (341).

(4) (1801) 6 Ves. 334.



of mistake. In the latter case, you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement." The true position then is that in every case where rectification is sought, it must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon and that the writing afterwards signed failed to be, as it was intended, an execution of such previous agreement, but on the contrary expressed a different contract. Tested from this point of view, the case for the plaintiffs is abundantly made out. In the first place, there is reliable oral evidence of the negotiations antecedent to the execution of the mortgage instrument, which shows that what was intended to be offered and accepted as security was the 2 as. 4 gds. ancestral share of the mortgagor in the original estate Tauzi No. 93 which at the time of the mortgage was part of the separate account Tauzi No. 93A; oral evidence was plainly admissible for this purpose; *Balkishen v. Legge* (1); *Jiwraj v. Norwich Assurance Co.* (2). In the second place, we have the admission of the mortgagor in the conveyance executed by him on the 11th April, 1911, that he had mortgaged to Jagadiswar Roy the 2 as. 4 gds. share obtained by him from his father in Tauzi No. 93A. In the third place, the surrounding circumstances point to the same conclusion. At the date of the mortgage, the mortgagor did not possess a 2 as. 4 gds. share in what was then Tauzi No. 93, that is, the residuary estate. To hold that, notwithstanding this circumstance, he professed to hypothecate a share in excess of what he owned in fact, would be to attribute to him a design to defraud the mortgagee; there is no indication that he harboured such intention; on the other hand the subsequent admission contained in the conveyance of the 11th April, 1911, militates against a possible theory of fraud. Consequently, if we look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, the subject matter of the contract, the provisions and expressions of the instrument, and if further, we call in aid the acts done under the instrument, and contemporaneous writings made between the parties near or subsequent to the time when the deed was executed, we cannot but come to the conclusion that the evidence is clear and convincing that the mortgage instrument does not correctly describe the property which the mortgagor and mortgagee agreed should be given and accepted as security. Here then is an instance, not of mistake as to the identity of the property itself, but of

CIVIL.

1921.

Bepin Krishna

Jogeshwar.

Mookerjee, J.

(1) (1899) L. R. 27 I. A. 58; 1 L. R. 22 All. 149 (158).

(2) (1905) 5 Bom. L. R. 853.

## CIVIL.

1921:

Bepin Krishna

Jogeshwar.

Mookerjee, J.

a misdescription of it in the written instrument. This is precisely the class of cases where reformation is decreed, provided the mistake was mutual: *Walden v. Skinner* (1); *Adams v. Henderson* (2), and examples are by no means rare where correction has been made in the description of the premises in deeds, mortgages, conveyances, particularly mistakes in the number of the township, section, lot, block, boundary line, or street. That the mistake was mutual in this case cannot we think be seriously disputed. Both parties, as is amply clear on the evidence, had the common intention that the 2 as. 4 gds. share of the mortgagor inherited by him from his father should be hypothecated. That share, at the time of the transaction, was included in Tauzi No. 93A and not in Tauzi No. 93. The writer of the deed, however, described it as included in Tauzi No. 93. There is no direct evidence to show how this error was brought about, nor is it necessary to indulge in speculation on that point. The only question is, whether, the mistake was mutual, that is, a mistake reciprocal and common to both parties, in other words, whether each alike laboured under the same misconception in respect to the terms of the written instrument. To put the matter concisely, was there a common intention different from the expressed intention and a common mistaken supposition that it was rightly expressed. The answer must be in the affirmative; for this, it is not necessary to hold that a mutual mistake of the agents of the parties is always necessarily a mistake of the parties; but undoubtedly it would be in the case where the error was committed by a writer who acted as common agent of both parties in drafting the instrument. The essence of the matter is that mutuality of mistake might arise from the fact that the mistake was made by a writer who acted as mutual agent of both parties in reducing the contract to the form of a written instrument. Where there is unilateral mistake, rectification is refused on the ground that if the Court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement of the parties as it was before, and the Court would have been engaged in what would be a singular task for a Court of equity to undertake, namely, doing right to one party at the expense of a precisely equal wrong to the other. No such consideration obviously arises in cases of the type now before us, for it cannot be urged here that in granting

(1) (1880) 101 U. S. 577. (2) (1897) 168 U. S. 573.

relief to the plaintiff on the ground of his mistake, the Court would be imposing upon the other party the erroneous conception of his opponent. It may further be added that if the theory be adopted that the mistake was brought about deliberately by the mortgagor, his conduct might be deemed fraudulent, so that on establishment of fraud the mortgagee might claim rectification, mistake or no mistake. Consequently where the defendant is shown to have been aware not only that the instrument did not express the real agreement but also that the plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is clearly one for reformation: *Clark v. Girdwood* (1); *Loresy v. Smith* (2); *Corley v. Stafford* (3); *Tucker v. Bennett* (4). There is thus no escape from the conclusion that the circumstances of the case before us attract the operation of the rule that in order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong.

We have next to consider, whether the Court should refuse to rectify the mortgage instrument on the ground that such rectification will prejudice the rights acquired by a third person in good faith and for value. The Subordinate Judge has answered this question against the eighth defendant. In his view, the purchase of the mortgage property by the contesting defendant was made neither in good faith nor for value. The evidence as to the payment of consideration has been placed before us and the judgment of the Subordinate Judge has been criticised on the ground that he has rejected positive testimony on mere suspicion, a course emphatically disapproved by the Judicial Committee on more than one occasion; as was observed by Sir Lawrence Jenkins in *Mina Kumari v. Bejoy Singh* (5), and by Lord Shaw in *Muhammad Mahbub Ali v. Bharat Indu* (6), the decision of the Court should rest, not upon suspicion but upon legal grounds established by legal testimony; this follows the earlier dicta of Lord Westbury in *Sreeman v. Gopaul* (7) and Lord Hobhouse in *Uman v. Gandharp* (8). There is considerable force in this contention. The evidence of payment

(1) (1877) 7 Ch. D. 9.

(2) (1880) 15 Ch. D. 655.

(3) (1857) 1 DeG. &amp; J. 239.

(4) (1887) 38 Ch. D. 1.

(5) (1916) L. R. 44 I. A. 72; 1 L. R. 44 Calc. 662; 25 C. L. J. 508.

(6) (1918) 23 C. W. N. 321.

(7) (1866) 11 M. I. A. 28; 7 W. R. P. C. 10.

(8) (1887) L. R. 14 I. A. 127; 1 L. R. 15 Calc. 20.

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

CIVIL.

1921.

Bepin Krishna

Jaggeswar.

Mookerjee, J.

of consideration by cheque on the Chartered Bank cannot be brushed aside, and there is no solid foundation laid in the evidence to support the hypothesis that the purchaser received back the money from the vendor. If that theory had been satisfactorily made out, there would be no real transfer at all; the transaction could then have been branded as fictitious, brought about by conspiracy between the vendor and the purchaser with a view to throw an effective obstacle in the way of the mortgagee. But the evidence does not prove conclusively that the sale was colourable, although the genuineness of the transfer is undoubtedly open to grave suspicion. It is needless, however, to discuss further, whether the transfer was for value, because there is no room for serious controversy that the purchase cannot be deemed to have been made in good faith. There is no satisfactory evidence that the eighth defendant made the usual enquiries at the time of his alleged purchase. We have further the significant fact that the conveyance which he had taken five months earlier on the 11th April, 1911, actually contained a recital that this ancestral share of Ramachandra Bose had been mortgaged to Jagadiswar Ray. Direct evidence is not available to prove that he remembered this recital when he took the second conveyance on the 19th September, 1911. If there had been such evidence, the proof of knowledge would have been at least as effective as notice and would thus have been completely destructive of the plea of purchase in good faith. The conception of notice was introduced into law and the rules concerning it were established, from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is therefore in its essential nature inferior to knowledge. It necessarily follows that whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as a substitute has been more accurately accomplished in another manner. To sum up in one statement, if the party has in any way obtained the full knowledge, those same results must necessarily and even in a higher degree, be attributed to it—the very substance itself—which are, from motives of general policy, attributed to notice as its representative

and substitute. But it is not necessary in the present case to establish that the contesting defendant had actual knowledge of the existence of the mortgage, for it is plain that the recital in the conveyance accepted by him on the 11th April, 1911 did in law constitute constructive notice. I am not unmindful that the conveyance of the 11th April, 1911 related to a share of Tauzi No. 93 whereas the conveyance of the 19th September, 1911 was in respect of a share of Tauzi No. 93A. The two Tauzis, however, were not essentially distinct properties within the meaning of the well-known principle enunciated by Lord Redesdale in *Hamilton v. Royse* (1) and quoted with approval by Smith M. R. in *Tressilian v. Caniffe* (2). "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed; the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase." The principle in essence is that notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. Consequently, where one is purchasing a particular piece of real estate, and his title deeds recite a charge upon, or equitable interest in, another piece in favour of a third party, such recitals would not affect him with notice of such charge or interest, in the event of his subsequent purchase from the holder of the legal title to the other property. He is not presumed to carry the knowledge thus imputed to him in the first transaction in his memory until the second purchase has been effected. The reason and limits of this rule were lucidly put by Rogers J. in *Boggs v. Varner* (3), when he was asked to receive in evidence recitals in the title papers to a different piece of property from that in suit with a view to charge a purchaser with notice of any antecedent unregistered instrument or an equitable interest: "The evidence would lead to dangerous consequences, for it is impossible for any one to recollect the recitals

CIVIL.

1921.

Bopin Krishna

v.

Jogeshwar.

Mookerjee, J.

(1) (1804) 2 Sch. and Lef. 315.

(2) (1855) 4 Ir. Ch. R. 399.

(3) (1843) 6 Wal. &amp; Sor. 473.

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

in deeds under which he may claim. Let this be held to be admissible and competent to affect a subsequent purchaser with notice, it would follow that no man can safely purchase until a most careful examination and inspection of every deed to which he may be a party and under which he claims." The case before us is obviously distinguishable and is not affected by these considerations. Under the Revenue Sale Law, notwithstanding that a separate account has been opened, the separate account and the residuary estate continue ultimately liable to the State for the entire revenue, and in certain specified contingencies the entire estate is liable to be exposed for sale by the revenue authorities for the realisation of arrears. Consequently, in order to trace the history of either fragment of the estate, an examination of the antecedent dealings in respect of both would be undertaken by the prudent investor. Thus, under ordinary circumstances, knowledge acquired "in course of transactions with regard to either fragment of the estate may well be deemed as acquired in course of transaction with regard to the same property" or "in the investigation of the same chain of title." The conclusion thus appears inevitable that the contesting defendant is not entitled to the protection extended to a purchaser in good faith and for value.

Finally, it has been urged as a last resort on behalf of the contesting defendant that even though it should be clearly established that through the mutual mistake of the parties to the mortgage contract, the instrument in writing did not truly express their real intention, the Court cannot, at any rate, the Court should not, in its discretion, rectify the mortgage deed, inasmuch as a decree has already been made thereon by a competent Court. Such decree, it has been argued, has extinguished the mortgage security, and reformation at this stage would in essence be a rectification of the decree of one Court by another, contrary to well-established principles. In support of this argument, reference has been made to the decisions of the Judicial Committee in *Hetram v. Shadilal* (1); and *Matni Mal v. Durga Kumvar* (2); and of this Court in *Sadho Misser v. Golab Singh* (3); *Jogeshwar v. Ganga Bishnu* (4); *Chand Mea v. Asima Banu* (5); *Bhondi Singh v. Dowlat Roy* (6); and *Kusodhaj v. Braja Mohan* (7). Not one of these decisions, it has been conceded, is directly in point, and the events which led up

(1) (1918) L. R. 45 I. A. 130; I. L. R. 40 All. 407; 28 C. L. J. 188.

(2) (1919) L. R. 47 I. A. 71; 32 C. L. J. 121.

(3) (1897) 3 C. W. N. 375; (4) (1904) 8 C. W. N. 473.

(5) (1906) 10 C. W. N. 1024; 3 C. L. J. 43.

(6) (1912) 15 C. L. J. 675. (7) (1915) I. L. R. 43 Calc. 217.

to the litigation in each of these cases bear no analogy to those antecedent to the present suit; but an attempt has been made to invoke the aid of the general principles which, it is said, may fairly be extracted from the cases mentioned. In *Hetram v. Shadilall* (1), Viscount Haldane observed that the effect of a decree made under section 89 of the Transfer of Property Act for the sale of mortgage property is to substitute the right of sale thereby conferred upon the mortgagee for his rights under the mortgage which are thereupon extinguished. This principle which was also recognised in *Matru Mal v. Durga Kunwar* (2) clearly does not touch the question before us, namely, the competence of a Court to direct rectification of a mortgage instrument when the elements specified in section 31 of the Specific Relief Act have been established. No doubt, when such rectification has been made by order of Court, what the effect thereof may be on the decree previously made is a question which we shall presently have to consider. In *Sadho Misser v. Golab Singh* (3), it was ruled that the only ways in which a decree may be set aside by a party thereto are by appeal, by proceedings under section 108 Civil Procedure Code (1882) and similar sections, and by application for review; if the decree is not tainted by fraud, no suit lies to set it aside. In that case, an amendment had been made in the pleadings without notice to a party who had not entered appearance in the suit, and a decree was ultimately made in accordance with the amended pleading. The absent defendant thereupon instituted a suit to set aside the decree on the ground that as he had not been served with notice of the application for amendment of the plaint, he was not bound by the decree and was entitled to treat it as not affecting his rights. Trevelyan and Beverley JJ., held that as no attempt had been made to set aside the decree as provided by law, the suit could not be maintained. In *Jogeshwar v. Ganga Bishnu* (4), it was held that a suit lies in a civil Court to rectify a mistake in a decree. It appears that in a previous mortgage suit, a property which was correctly described in the plaint as property No. 4 was by mistake described as property No. 3 in the written statement. This property was ultimately released as not liable to be foreclosed, but was described as property No. 3 in the judgment, and the error was reproduced in the decree. A suit was thereupon instituted for rectification of the error. The Subordinate Judge dismissed the suit. On appeal to

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Meekherjee, J.

(1) (1918) L. R. 45 I. A. 130; I. L. R. 40 All. 407; 28 C. L. J. 188.

(2) (1919) L. R. 47 I. A. 71; 32 C. L. J. 121.

(3) (1897) 3 C. W. N. 375; (4) (1904) 3 C. W. N. 473.

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

this Court Mitra, J. was pressed to follow the rule recognised in *Ainsworth v. Wilding* (1), and to hold that the suit could be maintained for rectification of the error. This contention was overruled. On appeal under the Letters Patent, Maclean C. J. (Pargiter, J. concurring) reversed this decision and held that the suit lay to rectify the mistake in the decree. The Chief Justice pointed out, that the suit was of a civil nature within the meaning of section 11 Civil Procedure Code (1882) and was cognizable by a civil Court, as there was no enactment in force to bar the suit. In *Chand Mea v. Asima Banu* (2) Ghosh and Pargiter JJ. referred to the decisions in *Sadho v. Golab* (3), and *Jogeswar v. Ganga Bishnu* (4), and held that it could not be broadly laid down that any error in a decree may be challenged by a separate suit. There a decree for ejectment had been made in a suit for rent, though there was no prayer for ejectment in the plaint. The defendant applied for review of judgment, but was unsuccessful. He then instituted a suit to set aside the decree. The Court held that, in these circumstances, a separate suit was not maintainable to set aside a decree not tainted by fraud, obtained in the presence of both parties and apparently conclusive between them. In *Bhondi Singh v. Dowlat Roy* (5), Brett and Carnduff, JJ. referred to the earlier cases just analysed and held that a suit was not maintainable in a civil Court for amending the judgment and decree, previously passed in a suit between the same parties by another civil Court of competent jurisdiction, on the ground that a mistake had been made by the Judge in his judgment and decree. It was observed that as the Court had jurisdiction and authority to make the decree actually passed, another suit could not be instituted to set aside or modify that decree on the ground that the Judge had committed an error. In support of this view, reference was made to the remarks of the Judicial Committee in *Sri Gopal v. Pirthi Singh* (6). In *Kusodhaj v. Braja Mohan* (7), Jenkins C. J. held that though a decree can be set aside by suit on proof of fraud of the required character, a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree had made a mistake. The decision in *Jogeswar v. Ganga Bishnu* (4) was distinguished; it was also explained that the case of *Ainsworth v. Wilding* (1) was an instance of a consent decree and consequently belonged to the class of decisions typified by *Huddersfield Banking Co. v. Lister* (8),

(1) (1896) 1 Ch. 673.

(3) (1897) 3 C. W. N. 375.

(5) (1912) 15 C. L. J. 675.

(6) (1902) 6 C. W. N. 889 (896); L. R. 29 I. A. 118; I. L. R. 24 All. 429.

(7) (1915) 1 L. R. 43 Calc. 217.

(2) (1906) 10 C. W. N. 1024.

(4) (1904) 8 C. W. N. 473.

(8) (1895) 2 Ch. 273.



and *Wilding v. Sanderson* (1). These cases show that an order made in an action by consent and based upon and intended to carry out an agreement come to between the parties, can be set aside on any ground (such as mistake) on which an agreement in the terms of the order could be set aside. But these cases do not show that a decree after contest can be set aside or rectified in a fresh suit on the ground that the Judge was mistaken though his decree accurately expressed his intention: *Preston Banking Co. v. Allsup* (2). Jenkins C.J. added that if the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in Court, then his misfortune would be gravely increased to the public detriment. These principles are clearly inapplicable to cases of the type now before us. Here the question of fundamental importance, stripped of all technicalities, is, whether the mutual mistake of the parties to the mortgage transaction manifested in the mortgage deed, which has extended into judicial proceedings, automatically as it were, without mistake on the part of the Judge, is still capable of rectification. On principle, the answer should clearly be in the affirmative, for as Neville J. observed in *Thompson v. Hickman* (3) to grant relief by way of rectification where the error has crept into one document and refuse it where it is embodied in two, is inconsistent with equitable principles, for equity regards the substance rather than the form of a transaction. There is no substantial reason for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the purchasers to a reformation as against his immediate vendor, equity may work back through all, and entitle the last purchaser to a reformation against the original grantor. Similarly, it may be held as a general rule that if there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned; and this view was actually adopted in *Balaprasad v. Kanoo* (4). We do not overlook, however, that if the decree has been executed and title has passed to a purchaser, fresh considerations may arise, and questions of some nicety which require examination from a new standpoint, may present themselves for solution. It may be contended, for instance, in such a case where the purchaser did not intend

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

(1) (1897) 2 Ch. 534.

(2) (1895) 1 Ch. 141.

(3) (1907) 1 Ch. 550 (562).

(4) (1911) 8 Nagpore L. R. 13.

CIVIL.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookerjee, J.

to buy land other than that described erroneously in the mortgage, that it would not be fair to rectify the sale certificate. In such a contingency, comprehensive relief by reformation of the description running through all the papers in the judicial proceeding may well have to be refused; the proper course for the party aggrieved may be to obtain reformation of the mortgage and to institute new proceedings for the enforcement of the rectified instrument. Cases of this description may give rise to questions of great complexity and have led to a marked divergence of judicial opinion in the Courts of the United States, as is amply indicated by the notes to the decisions in *Stewart v. Wilson* (1), *Dillart v. Jones* (2), *Fisher v. Villamil* (3). It is not necessary, however, for our present purpose to attempt an exhaustive formulation of the principles which may have to be invoked when the mutual mistake has been reproduced from the mortgage deed into the mortgage decree and thereafter into the certificate granted on the consequent public sale. The case before us is fairly simple; the parties have not yet reached beyond the state of the mortgage decree and the commencement of execution proceedings thereon. We are thus not called upon to rectify the sale certificate granted to a purchaser; and it cannot be urged that a decree granting such drastic relief as rectification of the sale certificate would invest the purchaser with title to property which was never advertised, offered for sale, or sold to him, and which might have been purchased by others at a higher figure, had it been correctly described in the sale proclamation. We are consequently of opinion that the mortgage instrument should be rectified and that on the basis thereof similar rectification should be made in the pleadings in the mortgage suit, in the mortgage decree and in the proceedings for execution thereof, which were suspended as a result of the order of the 3rd February 1912 and will now stand revived and after amendment will be continued in accordance with law. Cf. *Kamaruddin v. Jawahir Lal* (4); *Maharaja of Darbhanga v. Homeswar* (5). As the contesting defendant has purchased the mortgage property during the pendency of the execution proceedings, he will be bound thereby, for in the case of a mortgage suit the *lis pendens* does not terminate till the security has been realised for the satisfaction of the judgment debt.

(1) (1904) 141 A. 2, 405; 109 Am. St. Rep. 33.

(2) (1902) 229 Ill. 119; 11 Ann. Cas. 802.

(3) (1911) 62 Fla. 472; 29 Ann. Cas. 1003; 13 L. R. A. (N. S.) 90.

(4) (1905) L. R. 32 I. A. 102; 1 L. R. 27 All. 334; 1 C. L. J. 381.

(5) (1920) L. R. 48 I. A. 17; 33 C. L. J. 109.

*Surjiram v. Barhamdeo* (1); *Parsotam v. Chheda Lal* (2); *Faiyaz Hossain v. Pragnarain* (3); *Lokenath v. Achitananda* (4). The appellant cannot have any legitimate grievance against the application of the doctrine of *lis pendens* because the principle of the decision in *Lokenath v. Achitananda* (4) namely, that misdescription of property involved in a litigation is sufficient to render the doctrine of *lis pendens* inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things (Bennet on *Lis pendens*, pp. 154-159).

The conclusion follows that the decree made by the Subordinate Judge is substantially correct and this appeal must be dismissed with costs.

**Buckland, J.**—I agree and have nothing to add.

A. T. M. *Appeal dismissed.*

- (1) (1906) 2 C. L. J. 283. (2) (1906) 1 L. R. 29 All. 76.  
 (3) (1907) L. R. 34 I. A. 102; 1 L. R. 29 All. 339; 5 C. L. J. 563.  
 (4) (1909) 15 C. L. J. 391.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and  
 Mr. Justice Newbould.*

MAHARAJADHIRAJ SIR BEJOY CHAND MOHATAP  
 BAHADUR

*v.*  
 KRISHNA CHANDRA MUKHERJEE AND OTHERS \*

*Chaukidari chakran land—Land resumed—Putni lease—No contract as to rent payable for chakran land—Zemindar, if entitled to rent.*

Where the contract between the parties, that is the putni lease, does not contain any stipulation as to the rent payable for the chakran lands to the zemindar, the latter is entitled to some rent in addition to the amount payable to the chaukidari fund. As to the amount of such additional rent, different views have been taken in different cases. In the present case, as there are no materials on the record, the putnidar was given something on account of collection charges.

Appeal by Defendant No. 1.

Suit for recovery of certain chaukidari chakran lands.

\* Appeal from Original Decree No. 31 of 1919, against the decree of Babu Sribe Chandra Chaudhury, Subordinate Judge, Third Court, of Midnapur, dated the 30th September, 1918.

Civil.

1921.

Bepin Krishna

v.

Jogeshwar.

Mookherjee, J.

Civil.

1920.

December, 8.

CIVIL.

1920.

Maharaja  
Bejoy Chand  
v.  
Krishna.

December, 8.

The material facts appear from the judgment.

*Babus Bepin Behari Ghose and Sarat Kumar Mitter* for the Appellant.

*Babus Satowripati Roy and Peary Mohan Chatterjee* for the Respondents.

The judgment of the Court was as follows :

This appeal arises out of a suit brought by the plaintiffs who are the putnidars of Lot Jamitta under the defendant No. 1 for recovery of certain chaukidari chakran lands on the ground that the lands are included in their putni.

The lands were transferred on the 10th March, 1915, to the defendant No. 1 (under the provisions of Act VI of 1870 B. C.) who it appears, settled the same with the other defendants and kabuliyats were taken from some of them after the institution of the suit. The defence was that the plaintiffs were not entitled to these lands, and that, at any rate, they were bound to take fresh settlement and pay additional rent for the lands.

The Court below has held that the lands were included in the putni, and that the plaintiffs were entitled to get possession of the lands without payment of any additional rent. In the result, the suit was decreed, the defendants being ordered to pay mesne profits for a period of three years prior to the suit.

The defendant No. 1 has appealed to this Court.

The first question for consideration is whether under the terms of the contract between the parties, the plaintiffs are entitled to these chaukidari chakran lands.

The putni kabuliyat has been placed before us. It appears therefrom that Lot Jamitta consisting of 16 mouzahs was let out in putni, and that there was no reservation with regard to chaukidari chakran lands.

It is contended, however, on behalf of the appellant that it is not stated in the kabuliyat that all the lands of the mouzah were let out in putni. But, as mentioned above, it is stated that the 16 mouzahs of Lot Jamitta were granted in putni. It surely means that the whole of the zemindar's interest in the Lot was granted in putni with the exceptions mentioned in the document, and the only exceptions in the document, were with regard to "tank, excavations and the rent of the lands, which had by any sanad been granted by the zemindar to other persons and with regard to gardens, havelis and lands which were held by the estate in khas possession in the Lot." It appears therefore that all the lands in the mauzahs of the

Lot, excepting those specially mentioned, passed to the putnidar and included the chaukidari chakran lands.

The learned Subordinate Judge was wrong in relying upon a passage in the kabuliyat, namely, "I shall every year separately pay the sum demanded after resumption at the Sadar of the chakran lands of the thana under the tehsil of the zillah" in holding that chaukidari chakran lands were included in the putni. That passage evidently refers to thanadari lands has nothing to do with the chaukidari chakran lands. The only matter referred to in respect of the chaukidari chakran lands is contained in the passage which runs as follows: "I shall appoint and dismiss the chaukidars and other persons employed on police duties in your Bakshi Department whenever any such person has to be appointed or dismissed and the sârcar shall have no concern with the matter." That shows that the putnidar was given the right of nominating and dismissing the chaukidars and that there was no reservation of the chaukidari chakran lands in the contract creating the putni and having regard to all the terms of the lease, we agree with the learned Subordinate Judge in holding that the chaukidari chakran lands were included in the putni.

The next question is whether the plaintiffs, the putnidars, are entitled to have the lands only on payment of the assessment payable to the chaukidari fund, or are liable to pay some additional rent on account of the land to the zamindar. The question no doubt should be decided, having regard to the terms of the contract in each case. In the present case the contract does not deal with the question.

The question has been raised and dealt with in a large number of cases. In the earliest reported case on the point viz. *Hari Narain Mozumdar v. Mukund Lal Mundal* (1), it was held that the putnidar was bound to pay to the zamindar such rent for these lands as correspondent to the proportion between the gross collections and the putni rent formerly payable by him. It was so held on the ground that the contract between the parties that is the putni lease did not contain any stipulation as to the rent payable for the chakran lands to the zamindar. Although, as stated above, the question is one which must be determined upon the contract between the parties, the Courts have acted upon the principle laid down in the case of *Hari Narain Mozumdar v. Mukund Lal Mundal* (1), except so far as we can see in two cases viz. one—the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (2), and another unreported

(1) (1900) 4 C. W. N. 814. (2) (1906) 1 L. R. 34 Calc. 109; 5 C. L. J. 33.

CIVIL.

1920.

Maharaja  
Bejoy Chand.  
v.  
Krishna.

CIVIL.

1920.

Maharaja  
Bejoy Chaud.  
v.  
Krishna.

case which will be referred to later. In the first case, the putnidar was held entitled to possession of the chakran lands without payment of any additional rent. The judgment of the learned Judges who decided the case however preceded upon different grounds Mr. Justice Rampini was of opinion that the case of *Hari Narain Mosumdar* (1) did not lay down any general principle, that the zamindar in that case was in the enjoyment of the services of the chaukidar and that it was admitted that by the assessment of the chaukidari lands the *hustbood* of the putni had increased. Mookerjee J. observed "If there were materials on the record corresponding to what were furnished by the parties in the case of *Hari Narain Mosumdar v. Mukund Lal* (1), it might have been necessary to consider whether the putnidars were bound to pay the zamindar any additional rent for these lands" and that "the principle which determines whether additional rent is payable or not was indicated in the case of *Hari Das Goswami v. Nistarini Gupta* (2). The decision of the question must ultimately depend upon the mode in which the rent was assessed at the inception of the putni. If at the time of such assessment the profits of all the land including chakran lands were fully taken into account, the zamindar would clearly have no right to claim any rent in addition to the putni rent." Mookerjee J. in a later case held that if there is no indication in the contract between the parties that at the time of inception of the grant, the putni rent was assessed on the basis of the assets of all the lands situated within the ambit of the putni inclusive of the chaukidari chakran lands, the putnidar should be made liable to pay some additional rent to the zamindar on account of these lands. (See *Mehtti Hossein v. Umes Chandra Mookerjee* (3).

A similar view was taken in *Gopendra Chandra Mitter v. Tara Prassana Mukerjee* (4), and *Hareck Chand Babu v. Charu Chandra Sinha* (5).

It may no doubt be said that where the putnidar is in enjoyment of the service of the chaukidar, he alone should get the benefit of the lands when they are enfranchised because he alone loses the services. But it is pointed out by their Lordships of the Judicial Committee in *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (6) that at the time when the putni grants (in that case) were made, the resumption of the chaukidari chakran lands was

(1) (1900) 4 C. W. N. 814.

(2) (1905) 5 C. L. J. 30. (3) (1917) I. L. R. 45 Calc. 685; 27 C. L. J. 494.

(4) (1910) I. L. R. 27 Calc. 598. (5) (1910) 13 C. L. J. 102 (109).

(6) (1918) I. L. R. 46 Calc. 173 (181); 29 C. L. J. 123.

not even contemplated. In the present case the putni was created so far back as 1846. Under the circumstances and in the absence of anything in the contract or any evidence to show that these chaukidari lands were taken into consideration, we are unable to hold that the putni rent was assessed after taking these lands into account.

1911 The unreported case referred to above (and Appeal No. 1500 of 1914) was decided by Fletcher and Teunon JJ. The learned Judges held that the putnidar was entitled to the chaukidari lands without payment of any additional rent to the zemindar. The learned Judges were of opinion that the cases on the point could not throw any light because the terms of the contract were not stated in the reports. The judgment proceeded upon the ground that the rent in the case was fixed and could not be altered. But that is so in almost every case of the putni; and although as we have already stated the question is to be decided upon the contract between the parties, the cases referred to by us lay down the principle, namely, that where there is nothing to show that chaukidari chakran lands were taken into account in assessing the putni rent, the putnidar must pay some additional rent for the lands. So far as that question is concerned, all the reported cases with the exception of the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (1), are in favour of the contention of the appellant. Even in that case as pointed out above, Mookerjee J. does not differ from the view taken in *Hari Narain Mozumdar's case* (2).

1915 We do not feel pressed with the unreported judgment of Fletcher and Teunon JJ. because there have been subsequent decisions of this Court [See *Radha Charan Chandra v. Maharaja Ranjit Singh* (3); *Mehti Hossein v. Umes Chandra Mookerjee* (4)] which have taken a view similar to that taken in a series of cases commencing with *Hari Narain Mozumdar's case* (2).

Having regard to the weight of authority on the point, we hold that the zamindar is entitled to some rent in addition to the amount payable to the chaukidari fund.

2220 As to the amount of such additional rent, different views have been taken in different cases. In some cases it has been assessed after taking into the consideration the *hustbood* of the mehal, in some others the assets have been divided half and half. In the case which came up before Fletcher and Teunon JJ. to which the defendant No. 1 was a party, 3rd of the assets

CIVIL.  
1920.  
Maharaja  
Bejoy Chand.  
v.  
Krishna.

191 (1) (1906) I. L. R. 34 Calc. 109; 5 C. L. J. 33.

(2) (1900) 4 C. W. N. 814.

(3) (1917) 27 C. L. J. 532.

(4) (1917) I. L. R. 45 Calc. 685; 27 C. L. J. 494.

CIVIL.  
1920.  
Maharaja  
Bejoy Chand  
Krishna.

of the chaukidari land was given to the zemindar, and  $\frac{2}{3}$  rds. to the putnidar by the learned District Judge. In this case there are no materials on the record in the point. The putnidar should be allowed something on account of collection charges, and in order to avoid further enquiry we think the putnidar might be given  $\frac{2}{3}$  rds. and the zamindar  $\frac{1}{3}$  rd. of the amount at which the lands were assessed by the Collector.

The result is that the plaintiffs are entitled to get khas possession of the chaukidari chakran lands in dispute on payment to the defendant No. 1 the amount of Rs. 60 as. 5 p. 3 (Rupees Sixty, annas five and pies three) payable to the chaukidari fund plus Rs. 20 as. 1 p. 9 (Rupees twenty anna one and pies nine) as additional rent on account of these lands to the defendant No. 1.

As regards mesne profits, the plaintiffs will be entitled to mesne profits at the rate of Rs. 40 as. 3 p. 6 (Rupees forty, annas three and pies six) per annum from the 10th. March 1915 up to the date when they get delivery of possession of the lands. This disposes of one portion of the cross-objection. The other part relates to the 8 bighas odd of chaukidari lands which have been left out because we understand these lands were not entered in the deed of transfer in favour of the defendant No. 1. It is stated before us that the omission in the deed of transfer has subsequently been rectified on the 10th. January 1919 and that the plots 6 and 7 of Schedule (ga) have now been included in the deed of transfer. It is contended that we should take cognizance of the facts which have happened since the institution of the suit and give a decree to the plaintiffs in respect of these lands also.

The alleged rectification of the deed of transfer, however, is said to have been made subsequent to the decision of the lower Court and the learned pleader for the appellant is not in a position to say whether the statements are correct. Under the circumstances, we do not think we should deal with these 8 bighas of land. But if what is stated on behalf of the respondent is correct, probably there will be no difficulty in the plaintiffs' getting settlement of those lands on the basis of this judgment from the defendant No. 1.

Each party to bear his own costs in both the Courts.

A. T. M.

*Decree varied.*



*Before Sir Nalini Ranjan Chatterjee, Knight, Judge, and Mr. Justice Pearson.*

GANGADHAR KALWAR

v.

SEKALI TELINI AND OTHERS.\*

CIVIL.

1921.

July, 19.

*Res judicata—Suits for damages—Suits tried together—Separate judgments—Issue same—Earlier decision operating as res judicata.*

Suits for damages were brought first by A against B and then by B against A. They were tried together upon the same evidence, the question at issue was common to both, but separate judgments were pronounced. The suit by A was dismissed, but the other suit was decreed. A appealed against the decree in the suit brought by B but did not appeal against the decree in the suit instituted by him :

*Held*, that the decision in the suit brought by A not having been appealed against, operated as *res judicata* in the other suit.

Appeal by the Defendant.

Suit for damages for malicious prosecution.

The material facts appear from the judgment.

*Babu Dwijendra Nath Mukherjee* for the Appellant.

*Moulvi A. S. M. Akram* for the Respondents.

The judgment of the Court was as follows :

This appeal arises out of a suit for damages for malicious prosecution :

July, 19.

It appears that the defendant (Gangadhar) brought a criminal case under section 504 Indian Penal Code against the plaintiffs who are the mother, wife and brother's wife respectively of one Janaki Teli against whom he had obtained a decree and taken out attachment of his homestead. The criminal case was dismissed and thereupon this suit for damages for malicious prosecution was instituted by the plaintiffs. The defendant (Gangadhar) also brought a suit for damages against the plaintiffs for having used abusive language to him (the defendant).

The suits were tried together upon the same evidence but two separate judgments were pronounced. The suit instituted by the present defendant for damages against the plaintiffs for having used abusive language was dismissed and then the plaintiffs' suit for

\* Appeal from Appellate Decree No 1473 of 1919, against the decree of G. C. Sankey, Esq., Additional District Judge of Assam Valley District at Sibsagar, dated the 24th March, 1919, affirming that of Moulvi Mahamed Chowdhury, Munsiff of Jorhat, dated the 18th August, 1917.

CIVIL.

1921.

Gangadhar  
v.  
Sekali Telini.

damages for malicious prosecution was decreed. The defendant appealed to the lower appellate Court in the suit for damages for malicious prosecution and did not appeal against the decree in the suit instituted by him. The learned District Judge held that the decision in the latter case operated as *res judicata*. He was also of opinion that if there was no abuse there could have been no reasonable cause and upon that finding dismissed the appeal without coming to any finding upon the question of malice.

The defendant has appealed to this Court.

Two contentions have been raised before us. The first is that the decision in the first suit does not operate as *res judicata*.

There is some divergence of judicial opinion upon the question whether the decree in one of two suits tried together and governed by the same judgment, in which the same question is in controversy, operates as *res judicata* in the other suit if no appeal is preferred in the one suit, although an appeal is preferred in the other. [See the cases of *Abdul Majid v. Jeo Narain Mahto* (1); *Mur'annissa Bibi v. Joynab Bibi* (2); and *Panchanada Velan v. Vaithinatha Sastrial* (3).] In all these cases it was held that the decision in one of the suits does not operate as *res judicata* in the other.

A contrary view was taken in certain decisions of the Allahabad High Court. See the cases of *Chajju v. Sheo Sahai* (4), and *Zuharia v. Debi* (5); (where the cases on the point are collected); *Dakhni Din v. Ali Asghar* (6), and *Lal Mahammad v. Shakuran* (7).

In the case of *Midnapore Zamindary Co., Ltd. v. Nityakali Dasi* (8), (a decision of this Court) the two suits were tried separately and the evidence also appears to have been different.

It is unnecessary to discuss the other cases on the point because in the present case there were two separate judgments though the evidence was the same, and the decision in the suit brought by the defendant Gangadhar was the earlier one. We think that in these circumstances the earlier decision in Gangadhar's suit not having been appealed against operates as *res judicata* in the other suit.

The question at issue which was common to both the suits was whether the plaintiffs did use abusive language towards Gangadhar.

(1) (1888) I. L. R. 16 Calc. 233.

(2) (1906) I. L. R. 33 Calc. 1101; 4 C. L. J. 142.

(3) (1905) I. L. R. 20 Mad. 333.

(4) (1887) I. L. R. 10 All. 123.

(5) (1910) 7 I. C. 156.

(7) (1913) 18 I. C. 867.

(6) (1910) 7 I. C. 909.

(8) (1914) 24 I. C. 243.

The onus of proving the affirmative of that issue was upon Gangadhar who was the plaintiff in the suit for damages, and the onus of proving that there was no abusive language used was upon the ladies who were the plaintiffs in the suit for malicious prosecution. But the finding is that the plaintiffs (the ladies) did not use any abusive language at all to the defendant (Gangadhar) and that the case that the plaintiffs used abusive language was false. That being so, we do not see how upon the face of that finding in the suit brought by Gangadhar the question is still open for decision in the other suit. So far as that issue is concerned, we must hold that the decision in the suit instituted by Gangadhar not having been appealed against, operated as *res judicata*.

The second contention is that the learned Judge was wrong in dismissing the appeal without deciding the question whether the defendant in bringing the criminal case was actuated by malice. The Court of first instance considered that question also, but the learned Judge has merely held that if there was no abuse, there could have been no reasonable cause.

The decree of the lower appellate Court must accordingly be set aside and the case sent back to that Court in order that the question of malice may be considered and the case disposed of according to law.

Costs do abide the result.

A. T. M.

Case remanded.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

CHAIRMAN, JALPAIGURI MUNICIPALITY

JALPAIGURI TEA COMPANY LTD AND ANOTHER\*

*Assessment—Bengal Municipal Act (III B. C. of 1884), Secs. 85 (a), 87—  
Circumstances and property—Several persons—Liability of each—Other per-  
son in joint occupation—Assessment list, defective.*

\*Appeals from Appellate Decrees Nos. 2816 and 2817 of 1916 against the decrees of Babu Asutosh Gupta, Officiating Subordinate Judge of Jalpaiguri, dated the 29th May, 1916, affirming those of Babu Nishi Kanta Banerji, Munsiff, 1st Court, of Jalpaiguri, dated the 12th June, 1914.

\*Appeals from Appellate Decrees Nos. 690, 1019 to 1024 of 1919, against the decrees of Babu Upendra Nath Biswas, Subordinate Judge of Jalpaiguri, dated the 20th December, 1918, affirming those of Babu Biswar Mazumdar, Munsiff, 1st Court, of Jalpaiguri, dated the 25th September, 1917.

CIVIL.

1921.

Gangadhar

v.

Sekali Telini.

CIVIL.

1921.

June, 21.

## CIVIL

1921.

Chairman, Jalpaiguri  
Municipalityv.  
Jalpaiguri Tea Co.

*Per Curiam*. Where the sale proceeds of tea grown outside the local limits of the Municipality are brought within the Municipal limits and placed in the Bank to the credit of the Companies, they may be described as their 'circumstances and property,' that is their 'means and property,' within the Municipality, and furnish a just measure of their liability to assessment under section 85 (a) of the Bengal Municipal Act.

Section 85 (a) of the Bengal Municipal Act is not limited in its application to a case where only one person occupies an entire holding. Where personal tax is in operation, several persons occupying the same holding are each subject to assessment, according to their respective circumstances and property within the Municipality.

Where the assessment list does not show the income upon which the tax was assessed, it is a defect of form and does not invalidate the assessment: *Chairman of Chittagong Municipality v. Jogesh* (1).

Every defect in the assessment list prepared under section 87 of the Bengal Municipal Act, does not destroy the jurisdiction of the Commissioner and render the assessment *ultra vires*.

*Per Mookerjee, J.*: What constitutes the circumstances and property of a person within the Municipality within the meaning of section 85 (a) of the Bengal Municipal Act, depends upon the facts of the particular case.

To determine, whether, in a given set of circumstances, a person may be said to be in occupation of a holding for purpose of assessment of rates and taxes, various tests are to be applied: *Ambika v. Satish* (2) and *Gabinda v. Kailash* (3) explained.

Where the possession of a holding by each of the persons is actual, is as of right, and is not of a transient character, such possession, if being exclusive, constitutes 'occupying a holding' within the meaning of section 85 (a) of the Bengal Municipal Act. The statement that occupation must be exclusive, does not mean that nobody else has any right in the premises.

If a tax is assessed on a person as occupier, he does not cease to be occupier because other persons are jointly in occupation with him.

Appeals by the Defendant.

Suit for declaration.

The material facts are stated in the judgment of Mookerjee, J.

*Babus Mahendra Nath Ray* and *Manmatha Nath Ray* for the Appellant.

*Babus Brojo Lal Chakrabutty* and *Hemendra Nath Bose* for the Respondents.

**Mookerjee, J.**—These two appeals are directed against the decrees of the lower appellate Court, made in affirmance of the

(1) (1909) 1 L. R. 37 Calc. 44.

(2) (1898) 2 C. W. N. 689.

(3) (1905) 15 C. L. J. 689.

decrees of the trial Court, in two suits instituted by the plaintiffs respondents to contest the legality of the assessment of personal tax and latrine fee on them by the Commissioners of the Jalpaiguri Municipality. The plaintiffs are two Companies, the Jalpaiguri Tea Co., and the Chuniajhora Tea Co., which have their registered offices within the Municipal limits of the town of Jalpaiguri. The defendant Municipality in exercise of statutory powers (under the Bengal Municipal Act, 1884) assessed on the plaintiffs at the last general assessment a personal tax of Rs. 84 each per annum under section 85(a) and a latrine fee of Rs. 7-3 each per annum under section 86(f). These are the assessments challenged in the two litigations. Section 85 provides that the Commissioners may impose within the limits of the municipality, one or other of the following taxes:—

“(a) a tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality :

“Provided that the amount assessed upon any person in respect of the occupation of any holding shall not be more than eighty-four rupees per annum ; or

“(b) a rate on the annual value of holdings situated within the municipality :

“Provided that such rate shall not exceed seven and a half per centum on the annual value of such holdings, except within the municipalities of Howrah, Patna, Dacca and Darjeeling, in which it shall not exceed ten per centum on such annual value ; and provided also that no rate shall be imposed on any holding of which the annual value is less than six rupees :

“Provided that both the taxes shall not be in force at the same time in the same ward.”

Section 86 provides that the Commissioners may order that a fee for the cleansing of latrines be levied within the limits of the municipality in addition to either of the taxes mentioned in section 85.

The plaintiffs attack the tax imposed under section 85(a) as *ultra vires* on three grounds, namely, first, that the amount was assessed on the basis of their circumstances and property outside the municipality ; secondly, that each of the joint occupants of a holding has been separately assessed at the maximum amount ; and, thirdly, that the statutory procedure for assessment has not been followed. The plaintiffs challenge the latrine fee as *ultra vires* on the ground that each of two Companies who are joint occupiers of one holding has been separately assessed with the entire latrine fee payable. No further reference will be made to the legality of the

CIVIL.

1921

Chairman, Jalpaiguri  
Municipalityv.  
Jalpaiguri Tea Co.

Mookerjee, J.

CIVIL.

1931.

Chairman, Jalpaiguri  
Municipality

Jalpaiguri Tea Co.

Mookerjee, J.

latrine fee, as the question, in so far as it has been decided in favour of the plaintiffs, has not been reargued in this Court. We are consequently concerned now, solely with the matter of the legality of the tax imposed under section 85 (a) which has been pronounced *ultra vires* by the concurrent judgments of the Courts below.

The facts relevant for the determination of this question are not challenged in this Court and may be briefly recited. The head office of each of the Companies is situated within the municipality. Their income is derived from tea gardens in the Western Doars in the district of Jalpaiguri, beyond the municipal jurisdiction of the town of Jalpaiguri. The tea is sent direct from the gardens to Calcutta and sold there. The sale proceeds are sent to the Jalpaiguri Banking and Trading Corporation which is the financing bank of the two companies and has its office in the town of Jalpaiguri. The amounts received by the Bank are placed to the credit of the respective companies. The sum due on account of advances made by it as loan to the companies are first deducted from the receipts. From the balance, the expenditure is met, and then dividends are declared in a general meeting of the shareholders. It is not disputed that the amount thus received by the Bank to the credit of each company from outside the municipal limits exceeds Rs. 30,000 a year, and at the sanctioned rate of one rupee for Rs. 160, would justify the levy of the maximum tax of Rs. 84. On these facts, the municipality maintains that the income thus received by each company at Jalpaiguri constitutes its circumstances and property within the municipality for the purposes of section 85 (a), and that it is immaterial that the tea is grown in a garden outside the municipal limits or is sold in a market of Calcutta. This contention has been overruled by both the Courts below. We have arrived at the conclusion that the view taken by the Subordinate Judge whose judgment is under appeal cannot be supported.

There has been much controversy as to the precise meaning of the expression "circumstances and property within the municipality" used in section 85 (a), as is apparent from an examination of the decisions in *Kameshwar Pershad v. Chairman of Bhabua Municipality* (1); *Chairman of Giridih Municipality v. Srish Chandra* (2); *Deb Narain v. Chairman of Baraipur Municipality* (3);

(1) (1900) I. L. R. 27 Calc. 849.

(2) (1908) I. L. R. 35 Calc. 859; 7 C. L. J. 631.

(3) (1911) I. L. R. 39 Calc. 141; (1913) I. L. R. 41 Calc. 168; 19 C. L. J. 205.

*Chairman, Rajpur Municipality v. Nagendra Nath* (1); *Debendra Nath v. Chairman, Taki Municipality* (2); *Chairman of Joynagar Municipality v. Sailabala* (3); *Chairman of Behar Municipality v. Ramdeo Das* (4), and *Mahomed Ali Nawab v. Chairman of Behar Municipality* (5). What constitutes the circumstances and property of a person within the municipality must in a large measure depend upon the facts of the particular case. In some of the decisions just mentioned, the question arose whether the answer depended upon what the person got or on what he spent within the municipality. Sometimes it has been urged that the measure of his liability was what he got and not what he spent within the municipality; this contention was put forward by the assessee in *Chairman of Giridih Municipality v. Srish Chandra* (6), for the purpose of reduction of the assessment. On the other hand, in *Debendranath v. Chairman of Taki Municipality* (2), it was urged by the municipality that the test was what he spent and not what he received, because this would have enabled the municipality to increase the amount of assessment. It is not necessary for our present purpose to determine whether either of the two tests admits of universal application; here the same result is reached whichever test is applied. It is immaterial that the tea is grown in the interior of the district, beyond the municipal limits, and is sold in a far distant market. The fundamental fact remains that though the original source of the income may be outside the local limits of the municipality, the entire income is brought to be spent and enjoyed within the municipality. As was observed by Sir Lawrence Jenkins, C. J., in *Deb Narain v. Chairman of Baruipur Municipality* (7), the term "circumstances" in section 85 is equivalent to "means". There can be no room for doubt that the sale proceeds of the tea, when they are brought within the municipal limits and are placed in the Bank to the credit of the companies, may, without undue strain on the language, be described as their "circumstances and property", that is, their "means and property" within the municipality, and may consequently be taken to furnish a just measure of their liability to assessment under section 85 (a). In my opinion, the personal tax is not open to attack as *ultra vires* on the first ground mentioned.

CIVIL.

1921.

Chairman Jalpaiguri  
Municipalityv.  
Jalpaiguri Tea Co.

Mookerjee, J.

(1) (1919) 29 C. L. J. 379; 23 C. W. N. 475.

(2) (1920) 32 C. L. J. 210; 25 C. W. N. 45.

(3) (1920) 25 C. W. N. 47.

(4) (1920) Pat. 120; 4 Pat. L. J. 673.

(5) (1920) 1 Pat. L. T. 591.

(6) (1908) 1 L. R. 35 Calc. 859; 7 C. L. J. 631.

(7) (1911) 1 L. R. 39 Calc. 141; (1913) 1 L. R. 41 Calc. 168; 19 C. L. J. 205.

CIVIL.

1921.

Chairman, Jalpaiguri  
Municipalityv.  
Jalpaiguri Tea Co.

Mookerjee, J.

We have next to consider two minor objections, namely, (a) that where two tea companies jointly occupy the same holding each is not liable to be separately assessed under section 85 (a) and (b) that the assessment is vitiated, inasmuch as the list prepared under section 87 did not contain all the details enumerated in clause (d). In my opinion, these objections are groundless.

As regards the former of these points it may be observed that the tax which has been imposed is the tax upon persons contemplated by section 85 (a) and not the tax upon holdings prescribed by section 85 (b), section 85 (a) cannot plainly be limited in its application to a case where only person occupies an entire holding. The language does not justify such a restricted interpretation; and there is no good reason why in places where the personal tax is in operation, several persons occupying the same holding should not each be subject to assessment, according to their respective circumstances and property within the municipality. But, on behalf of the plaintiffs, it has been argued that such a comprehensive construction of section 85 (a) may cause hardship and may lead to results not reconcilable with the decisions in *Ambika v. Satish* (1), and *Gobinda v. Kailash* (2). In the first of these cases it was held that persons living with a particular individual (the occupier of a holding) by reason of some connection with or relation to him, such as sons or servants, could not be deemed to be occupying the holding within the meaning of section 85 (a) and would not be separately assessable by reason of possessing separate incomes. In the second case, it was held that when a naib of a zamindar resided on a holding, solely to carry on the business of the zamindar whose representative he was and who paid the rent therefor to the superior landlord, the zamindar and not the naib must be regarded as the occupier liable for payment of the tax. These decisions show that in concrete instances, and upon their special facts questions of nicety may arise, as to whether a person may be said to be in occupation of a holding within the meaning of section 85(a). This, indeed, is clear from an analysis of the elements included in the complex notion of occupation, see the judgments of Mellor and Lush, J.J. in *Queen v. St. Pancras Assessment Committee* (3). To determine, whether in a given set of circumstances a person may be said to be in occupation of a holding for purpose of assessment of rates and taxes, we may have to apply various tests; these need not be exhaustively enumerated, but some illustrations may be mentioned:

(1) (1898) 2 C.W.N. 687.

(2) (1905) 15 C. L. J. 689.

(3) (1877) 2 Q. B. D. 581.



taking possession as the primary element in occupation, the questions may be asked, is his possession actual, is it transient or temporary, has it a character of permanency, and is it as of right or merely by permissive license. Considerations akin to these may arise in a form of increased complexity where we have to deal with members of joint Mitakshara families, the case before us is, however, free from such serious difficulties. Here the possession of the holding by each of the companies is actual, is as of right, and is not of a transient character. Such possession, if it were exclusive, would undoubtedly constitute "occupying a holding" within the meaning of section 85(a). The only fact which, it is urged, deprives the possession of the characteristics of occupation is that another company is in joint possession in a precisely similar manner. I am of opinion that this circumstance is not material and that each company may, in the eye of law, be regarded as occupying the holding. I am not unmindful that there are expressions in cases reported in the books to the effect that occupation in order to be rateable must be exclusive; *Cory v. Bristow* (1); *London and N. W. Railway Company v. Buckmaster* (2). But as was pointed out by Lord Herschel, L. C., and Lord Davey in *Holywell Union v. Halkyn District Mines Drainage Co.* (3), the statement that occupation must be exclusive does not mean that nobody else has any right in the premises. The cases show that if a person has only a subordinate occupation, subject at all times to the control and regulation of another, then that person has not occupation in the strict sense for the purposes of rating, but the rateable occupation remains in the other, who has the right of regulation and control. Cases also frequently arise where two persons have rights over the same hereditament, the rights of each qualifying the rights of the other, and both persons are rateable; *Lancashire Telephone Co., v. Manchester* (4); *All Church v. Hendon Union Assessment Committee* (5); *R v. St. George's Union* (6). Where the rate is imposed upon the land itself, it may well be that as land may, so to speak, be subject to different strata of occupation super-imposed one upon another, an occupation of one kind may still be regarded as exclusive although other persons may use the land in some other way, and may even use it in such a way as to render themselves also rateable as occupiers. On the other hand, if the tax is assessed on a person as

CIVIL.

1921.

Chairman, Jalpaiguri  
Municipalityv.  
Jalpaiguri Tea Co.

Mookerjee, J.

(1) (1877) 2 App. Cas. 262 (276).

(2) (1874) L. R. 10 Q. B. 70 (444).

(3) (1895) App. Cas. 117.

(4) (1884) 14 Q. B. D. 267.

(5) (1891) 2 Q. B. 436.

(6) (1871) L. R. 7 Q. B. 90.

CIVIL.

1921.

Chairman, Jalpaiguri  
Municipality

Jalpaiguri Tea Co.

Moohorjee, J.

occupier, it is plain that he does not cease to be occupier because other persons are jointly in occupation with him. The second objection to the legality of the assessment must consequently be overruled as untenable.

As regards the final objection, namely, that the assessment list was not prepared in accordance with the provisions of section 87(d) (which requires that the list shall include a description of the holding and of the property within the municipality and the profession or business of the person assessed) we are informed that the assessment list did not show the income upon which the tax was assessed. In my opinion, this was a defect of form and did not invalidate the assessment: *Chairman of Chittagong Municipality v. Jogesh Chandra Rai* (1). There is clearly no foundation for the sweeping proposition that every defect in the assessment list prepared under section 87 destroys the jurisdiction of the Commissioners and renders the assessment *ultra vires*; and unless this is established, the civil Court has no jurisdiction to interfere: *Chairman, Municipal Board, Chapra v. Basudeo* (2); *Chairman, Rajpur Municipality v. Nagendra* (3). I hold accordingly that the assessment under section 85 (a) is not liable to successful attack on any of the three grounds specified.

The result is that these two appeals are allowed and the suits are dismissed in so far as the plaintiff seeks a declaration that the assessment under section 85 (a) was *ultra vires*. The decrees will stand in so far as they declare that the assessment of the latrine fee was *ultra vires*.

S. A. Nos. 690, 1019-1024 of 1919. It is conceded that these appeals will be governed by the above judgment in S. A. 2816 and 2817 of 1916, and similar decrees will be drawn up in these cases.

In each case, the plaintiff will pay costs in this Court and in the lower appellate Court to the defendant municipality: but all parties will pay their own costs in the Court of first instance.

**Buckland, J.**—The facts of these cases are simple. The respondent Companies, with the exception of the Anjuman Tea Company Limited, which has premises of its own, not shared with any other company, jointly occupy at Jalpaiguri a building or buildings in which they have their registered offices.

Each of them has been assessed under section 85 (a) of the Bengal Municipal Act at the maximum rate allowed thereby. It

(1) (1909) I. L. R. 37 Calc. 44.

(2) (1910) I. L. R. 37 Calc 374; 11 C. L. J. 400.

(3) (1919) 29 C. L. J. 379; 23 C. W. N. 475.

is not disputed that if they are liable to assessment under that section the maximum rate is not excessive.

They filed suits to have it declared that the assessments were illegal and *ultra vires* and to have them set aside and have succeeded in both the lower Courts.

Three points have been argued on this appeal. The first is that the conclusion as to the companies having property within the municipality is wrong in law upon the facts as found.

The second is that the companies who jointly occupy a holding cannot all be made liable.

The third is that the provisions of section 87 of the Act have not been observed.

As regards the first of these points it is not disputed that the procedure is for the tea, which of course is grown outside municipal limits, to be sent to Calcutta for sale. The companies are financed by the Jalpaiguri Trading and Banking Co. when the tea has been sold the proceeds, which are not paid to the companies or their agents, are credited in the companies' accounts with the Bank after being remitted to Jalpaiguri, where the balance after payment of the Bank's dues becomes available for dividends or for use in the concern as may be decided.

It is quite clear that these proceeds of the sale of tea, deposited in the Bank at Jalpaiguri are property within the municipality. These last four words involve a very simple question and do not necessitate any consideration of questions as to where the income accrues and so forth, such as are to be found in connection with questions of assessment for income tax. It has not been suggested that there are any other "circumstances" which have to be taken into account. This point therefore must be decided in favour of the appellant.

The second point does not concern the Ajuman Tea Co., for reasons already given. The lower Courts have not in my opinion approached this question from the right point of view. They have held that where more than one company occupies one holding, the definition of which is "land held under one title or agreement and surrounded by one set of boundaries" and does not give rise to any difficulty, the municipality is not entitled to divide the holding into several holdings and assess the companies accordingly. This has resulted in their not finding it necessary to deal with the point as now presented to us.

The companies undoubtedly are persons. They admittedly occupy holdings. There is nothing in the section which saves them

CIVIL.

1921.

Chairman, Jalpaiguri  
Municipality

Jalpaiguri Tea Co.

Buckland, J.

CIVIL.

1921.

Chairman, Jalpaiguri  
Municipality

Jalpaiguri Tea Co.

Buckland, J.

from liability because the occupation is joint. The tax is in the nature of a poll-tax, leviable on persons. Not however merely as persons, but according to their circumstances and property within the municipality. So far as a tax per holding is imposed, that is provided for by section 85 (b). Section 90 to which we were referred on behalf of the respondent companies supports this view. It provides the procedure if the aggregate amount of rates assessed on any person in respect of his occupation of two or more holdings, exceeds Rs. 84 per annum. That is to say it deals with assessments under section 85 (a). Were the tax not a personal tax but a tax per holding, clearly this section would have no place in the Act as in that case there would be no reason for abatement as provided by this section. In the course of argument the position of a Hindu joint family under Mitakshara law was referred to, in connection with the liability of an infant son at birth, who would have a share in the holding. The point does not arise for decision but that a joint occupier was incapable of earning income or did not own property independently of the other joint occupiers might well be a circumstance such as is contemplated by section 85 (a) for not assessing him to the full amount. This illustration of a possible application of the section does not affect the principle.

In my judgment the companies though joint occupiers of holdings are each of them liable to the tax under section 85 (a).

The third point is one of no substance. The complaint of the companies is that the assessment list contained no description of the property as required by section 87 (d). No proceedings were taken under section 113 which provides a remedy in such a case. Moreover the point which has been determined in favour of the respondent companies by the lower Courts is inconsistent with the second point as there taken on behalf of the companies that the municipality should not have divided the holding into several holdings for the purpose of assessment. I am not prepared to hold that the omission may invariably be negligible, but for the purposes of this appeal I do not think that the defect is fatal to the appellant. Section 358 was referred to in the course of argument but that does not help the appellant as it only refers to an assessment or rating of tax on property whereas the tax in question is one on persons.

For these reasons I concur in the orders to be made in the several appeals.

A. T. M.

*Appeals allowed in part*

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice  
Panton.*

ANNADA PROSAD GHOSH

v.

UPENDRA NATH DEY SIRCAR AND OTHERS.\*

CIVIL

1921.

August, 4, 5.

*Guardian—Minor defendant—Certificated guardian, appointment of, without his consent—Certificated guardian, if to signify his consent—Civil Procedure Code (Act V of 1908), O. 32, Rr. 3 (1), 4 (3)—Proposed guardian appealing against decree.*

Where the proposed guardian of a minor does not signify his consent, the Court should not, in contravention of the express direction of sub-rule (3) of rule 4 of order 32 of the Code of Civil Procedure, appoint him as guardian for the suit.

When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect : *Khairajmul v. Daim* (1) and other cases.

The provision as to the consent of the person proposed to be appointed guardian of the suit is mandatory and imperative.

It is obligatory on the Court under order 32 rule 3 (1) of the Code of Civil Procedure to appoint a proper person to be guardian of the minor defendant for the suit.

Sub-rule (3) of rule 4 of order 32 of the Code of Civil Procedure controls both sub-rule (1) and sub-rule (2) and places a material restriction upon the power which the Court may exercise thereunder.

Sub-rule (3) of rule 4 is applicable as well to cases under the sub-rule (1), as under sub-rule (2). No person who is competent to act as guardian of an infant either under sub-rule (1) or under sub-rule (2), shall be appointed guardian of the suit without his consent.

The appellant was an infant at the date of the institution of the suit. An application was made on behalf of the plaintiff that A who was appointed guardian of his person and property under the Guardians and Wards Act, might be appointed his guardian for the suit. Thereupon notices were issued upon the minor and the proposed guardian. The notices were reported to be duly served both upon the minor and his proposed guardian. There was no appearance, however, on behalf of the proposed guardian. The Court appointed the proposed guardian as guardian of the minor for the suit. At no stage of the suit, did the guardian appear and the result was that the suit was decreed *ex parte* against the infant described on the record as represented by the certificated guardian. Against this decree, the guardian on behalf of the infant preferred an appeal ;

\*Appeals from Appellate Decrees Nos. 2130, 2377 to 2379 of 1919, against the decision of Babu Krishna Kumar Sen, Subordinate Judge of Hooghly, dated the 19th June, 1919, affirming that of Moulvi Abdul Khalique, Munsiff of Hooghly, dated the 19th June, 1917.

(1) (1904) L. R. 32 I. A. 23 ; I. L. R. 32 Calc. 296 ; 1 C. L. J. 584.

CIVIL

1921.

Annada

Uppendia.

the appeal was dismissed. The present appeal was preferred by the minor, who attained majority, after the decree in the appellate Court :

*Held*, that under the circumstances the fact that the proposed guardian appealed against the decree, did not amount to consenting to his appointment as guardian for the suit : *Sharoo v. Raghunatha* (1).

Appeal by Defendant No. 4.

Suit for recovery of possession of immovable property on establishment of title.

The material facts appear from the judgment.

*Babu Debendra Nath Mandal* for the Appellant.

*Babus Bipin Behary Ghosh, Sarat Kumar Mitra and Karunamay Ghose* for the Respondents.

The judgment of the Court was delivered by

August, 5.

**MOOKERJEE, J.**—(*S. A. 2130 of 1919*) : This is an appeal by the fourth defendant in a suit for recovery of possession of immovable property on establishment of title. The appellant was an infant at the date of the institution of the suit on the 5th May, 1916. An application was made on behalf of the plaintiff that Hari Das Ghose who had been appointed guardian of his person and property under the Guardians and Wards Act 1890 might be appointed his guardian for the suit. Thereupon notices were issued upon the minor and the proposed guardian. The notices were in the form prescribed in Appendix H to the Code of Civil Procedure, and stated that if within the period prescribed an application was not made to the Court for the appointment of the proposed guardian or some friend of his to act as guardian of the minor for the suit, the Court would proceed to appoint some other person to act as guardian *ad litem* of the minor. On the 6th June, 1916 it was reported to the Court that the notices had been duly served both upon the minor and his proposed guardian. There was no appearance, however, on behalf of the proposed guardian ; yet the Court proceeded to appoint him as guardian of the minor for the suit. At no stage of the suit, did the guardian appear and the result was that the suit was decreed *ex parte* against the infant described on the record as represented by the certificated guardian. Against this decree, the guardian on behalf of the infant preferred an appeal to the Subordinate Judge and contended that the decree could not stand as against the infant. This contention was overruled and the appeal was dismissed. Since the date of the decree of the Subordinate Judge, the infant has

(1) (1915) 18 M. L. J. 401.

attained majority and the present appeal has been preferred by him in his own right. His contention is that the decree made by the primary Court is void and inoperative as against him and should be set aside with direction to that Court to retry the suit so far as he is concerned. This position has been controverted on behalf of the respondent. The decision of the question raised before us is not free from difficulty and depends upon the true construction of the provisions of order 32 of the Code of Civil Procedure.

Order 32, rule 3(1) provides that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. This makes it obligatory on the Court to appoint a proper person to be guardian of the minor defendant for the suit. The rule then prescribes the procedure to be followed for the purpose of such appointment. No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, and where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. Rule 4 next deals with the question as to who may act as next friend or be appointed guardian for the suit. The persons who may so act are divided into two classes. Sub-rule (1) provides that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. Sub-rule (2) provides that where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be. Then follows sub-rule (3) in the following terms: "No person shall without his consent be appointed guardian for the suit." The generality of the language used in sub-rule (3) makes it abundantly clear that the legislature intended this sub-rule to be applicable as well to cases under sub-rule (1) as under sub-rule (2); in other words, the legislature has prescribed that no person who is competent to act as guardian of an infant either under sub-rule (1) or under sub-rule (2) shall be appointed guardian for the suit without his consent. It was argued on behalf of the respondent in essence that this sub-rule is applicable only to cases of persons other than

CIVIL.

1921.

Annada

v.

Upendra.

Mookerjee, 7.

CIVIL.

1911.

Annada

v.

Upendra.

Mookerjee, J.

certificated guardians. This result, it was contended, follows from the provisions of the Guardians and Wards Act 1890, which define in sections 10 and 27 the duties of a person appointed as guardian of the person and property of an infant. Sub-section (3) of section 10 provides that the application of a person to be appointed guardian of an infant must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses. Section 27 provides that a guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it, if it were his own, and, subject to certain qualifications, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property. The respondent has urged that a guardian appointed under Act VIII of 1890 is under an obligation to defend a suit instituted against his ward; and that consequently, the Court where the suit has been instituted is entitled to presume, if not as a matter of law, at any rate as a matter of fact, that he will consent to be appointed guardian for the suit. We are of opinion that this contention should not prevail. If this were the intention of the legislature, sub-rule (3) of rule 4 might have been placed between sub-rules (1) and (2) or might have been framed in different words. For instance, it might have provided that no person, other than a certificated guardian, shall, without his consent, be appointed guardian for the suit. But, beyond this, a serious difficulty might arise, if the Court which had seisin of the suit were held-competent to appoint a certificated guardian as guardian for the suit even where he withheld his consent or expressly declined the appointment. A person appointed guardian for the suit in such circumstances, would, almost to a certainty, neglect to look after the suit, and the interest of the minor would be placed in serious jeopardy. It may be conceded that a certificated guardian who takes up such an attitude may render himself amenable to the disciplinary jurisdiction of the Court which appointed him as guardian. He may, indeed, be removed under section 39 for breach of duty or neglect of trust. But that clearly does not afford adequate protection to the infant, whose interests would be imperilled by the remissness of a person appointed, against his wishes, possibly in spite of his protest, to act as guardian for the suit. We are reluctant to adopt a construction of rule 4 which may conceivably lead to so disastrous a result. In our opinion, sub-rule (3) of rule 4 controls both sub-rule (1) and sub-rule (2) and places a material restriction upon the power which the Court may exercise thereunder. It is



thus plain that, in the case before us, as the proposed guardian did not signify his consent, the Court should not, in contravention of the express direction of sub-rule 3 of rule 4, have appointed him as guardian for the suit.

What then, is the effect of an appointment so made? It has been laid down in a long series of decisions that when a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect upon him. Amongst the decisions of the Judicial Committee, reference may be made to *Khirajmul v. Daim* (1); *Rashidunnisa v. Muhamad Ismail Khan* (2); and *Pratab Singh v. Bhabuti Singh* (3). Amongst the decisions of this Court, reference may be made to *Dakeshur Pershad Narain Singh v. Rewat Mehton* (4); *Narsingh Narain v. Sheikh Jahi Mistry* (5); *Bal Kishun v. Topeswar* (6); *Dinabandhu Nandi v. Mashuda Khatun* (7); *Purno Chandra v. Bejoy Chand* (8); *Narendra v. Jogendra* (9); *Baneswar v. Tarapada* (10); *Radhashyam v. Rangasundari* (11), and *Burendra Nath Bose v. Aghore Nath Bose* (12). A similar view was adopted by the Madras High Court in *Chundury v. Koripalli* (13), and *Sharoof v. Raghunatha* (14), though a contrary view appears to have prevailed at one time in that Court as indicated by the judgment in *Oodayanasamy Tevar v. Alagappa Chetty* (15). Indeed, it is now well settled that the provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative and this was emphasised by this Court in *Mohan v. Harprosad* (16). But the respondent has urged that the present case falls within the principle of the decision of the Judicial Committee in *Walian v. Banke Behary Pershad Singh* (17), which is clearly distinguishable. As appears from the judgment of the Judicial Committee in that case, the mother who had been proposed for appointment as guardian of her minor son had entered appearance and acted throughout the trial of the suit. No trace, however, could be found on the record, of a formal order

CIVIL.

1921.

Annada

v.

Upendra.

*Mookerjee, J.*

(1) (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296; 1 C. L. J. 584.

(2) (1909) L. R. 36 I. A. 168; I. L. R. 31 All. 572; 10 C. L. J. 318.

(3) (1913) L. R. 40 I. A. 182; I. L. R. 35 All. 487; 18 C. L. J. 384.

(4) (1896) I. L. R. 24 Calc. 25. (5) (1911) 15 C. L. J. 3.

(6) (1911) 15 C. L. J. 446. (7) (1912) 16 C. L. J. 318.

(8) (1913) 18 C. L. J. 18. (9) (1914) 20 C. L. J. 469.

(10) (1917) 26 C. L. J. 258. (11) (1920) 24 C. W. N. 541.

(12) (1920) 25 C. W. N. 525. (13) (1916) 31 M. L. J. 39.

(14) (1915) 18 M. L. T. 401. (15) (1903) 14 M. L. J. 342.

(16) (1917) 40 I. G. 2. (17) (1903) L. R. 30 I. A. 182; I. L. R. 30 Calc. 1921

CIVIL.

1921.

Annada

v.

Upendra.

Mookerjee, J.

for her appointment as *guardian ad-litem*. The Judicial Committee held in substance that the absence of a formal order of appointment as guardian is not fatal to the validity of the proceedings, where the proposed guardian has in fact appeared and acted on behalf of the minor. In such a contingency, the absence of the formal order may well be treated as a curable irregularity. That this is the true effect of the decision of the Judicial Committee follows from the decisions in *Janki Dass v. Mohabir* (1); *Pokhpal v. Chhiddu* (2); *Ram Asray Singh v. Sheo Nandan Singh* (3) and *Keshawesarendra Sahi v. Rance Debendra Bala Dasi* (4). This principle has obviously no application to the circumstances of this case; nor can the provision of section 99 Code of Civil Procedure be invoked successfully, because as pointed out in *Burendra Nath Bose v. Aghore Nath Bose* (5), where the Court proceeds to make a decree against an infant who is not properly represented by a guardian as contemplated by the Code of Civil Procedure, the Court acts without jurisdiction, inasmuch as a decree is made against a person who is in essence not before the Court.

It has been finally urged that the fact that the proposed guardian had preferred an appeal to the Subordinate Judge may be taken as an index that he had consented to his appointment as guardian for the suit. We are unable to give effect to this contention. No doubt the proposed guardian preferred an appeal on behalf of the infant; but we have the equally important fact that he never appeared during the trial of the suit and took no steps to protect the interest of the infant. The view we take is supported by the decision of the Madras High Court in *Shamof v. Raghunatha* (6). We hold accordingly that the decree made against the appellant cannot be maintained and must be vacated.

The result is that this appeal is allowed, the decrees of both the lower Courts set aside, only in so far as the appellant is concerned, and the suit remitted to the Court of first instance to be retried against him. The appellant is entitled to his costs in this Court from the plaintiff respondent; we make no order as to his costs in the Courts below.

It is conceded that this judgment will govern second appeals. Nos. 2377 to 2379 of 1919; a decree will be drawn up in similar terms in each of those cases.

A. T. M.

*Appeals decreed: cases remitted.*

(1) (1913) 22 P. C. 240.

(2) (1912) 9 A. L. J. 653.

(3) (1916) 1 Pat. L. J. 573.

(4) (1919) 4 Pat. L. J. 213; (1919) C. W. N. (Pat) 121.

(5) (1920) 25 C. W. N. 525.

(6) (1915) 18 M. L. T. 401.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir  
Asutosh Mookerjee, Knight, Judge.*

CHAITANYA CHARAN SET

MOHAMED YUSUF\*

CIVIL.

1920.

December, 6, 8.

*Judgment of affirmance—Civil Procedure Code (Act V 1908) Sec. 110—Variation of decree as to costs.*

A party is not entitled to appeal to His Majesty in Council where the High Court varied the decision of the lower Court as to costs but dismissed the appeal on the merits in all material respects, as the judgment is one of affirmance, the value of the subject matter of the suit fulfilling the requirement of section 110 of the Code of Civil Procedure : *Thakur Baldeo v. Thakur Lalji* (1) referred to.

Application for leave to appeal to His Majesty in Council by the Plaintiff.

Suit to recover damages for an alleged malicious prosecution.

The material facts are stated in the judgment of the learned Chief Justice

*Babus Biraj Mohan Majumdar and Satindra Nath Mukherjee* for the Petitioner.

*Babus Ram Charu Mitra and Surendra Nath Guha* for the Opposite Party.

C. A. V.

The judgments of the Court were as follows :

**Sanderson, C. J.**—This is an application by the plaintiff in the suit, for a certificate that this is a fit and proper case for leave to appeal to His Majesty in Council. There is no question as to the value of the subject matter of the suit, or the subject matter of the appeal ; but it is urged on behalf of the respondent that the judgment of the High Court against which it is desired to appeal was one of affirmance and that there is no substantial question of law involved. On the other hand, it is urged, by the learned vakil for the plaintiff, that the judgment of this Court was not one of affirmance, and that, if it was one of affirmance, there is a substantial question of law involved.

The suit was brought to recover damages for an alleged malicious prosecution. The first Court dismissed the suit without costs. The

\* Application No. 28 of 1920 for leave to appeal to His Majesty in Council from the decision of Mr. Justice Richardson and Mr. Justice Huda in Appeal from Original Decree No. 53 of 1919, dated the 17th May, 1920.

(1) (1906) 10 Oudh Cases 65.

December 8.

CIVIL.

1920.

Chaitanya

v.

Yusuf.

Sanderion, C. J.

matter then came on appeal to the High Court and the decree of the High Court was as follows : " It is ordered and decreed that the decree of the lower Court in so far as it relates to costs be set aside and in lieu thereof it is hereby ordered and decreed that the plaintiff do pay to the defendant No. 1 the costs incurred by him in the Court below with interest thereon at the rate of six per cent per annum from the date of the decree of that Court until realization : And it is further ordered and decreed that save and except as aforesaid the said decree of the lower Court be affirmed and this appeal dismissed : And it is further ordered and decreed that the plaintiff, appellant, do pay to the defendant No. 1 respondent the sum of rupees five hundred and thirty two and annas six being the amount of costs incurred by him in this Court, with interest thereon at the rate of six per cent per annum from this date until realization."

The first question which I have to decide, is whether in the circumstances of this case, the judgment of the High Court is one of affirmance. In my judgment it is. The only part of the judgment and decree of the lower Court which is varied by the decree of this Court was that part which related to costs. The costs were entirely in the discretion of the Court which heard the appeal. The Court exercised its discretion and ordered that the plaintiff should pay the costs of the suit in the first Court and the costs of the appeal to this Court. If we were to hold that this was not a decree affirming the decree of the lower Court, it would follow that whenever, in a case where the subject was of the requisite value, this Court varied the decision as to costs of the lower Court, however small the extent might be, and dismissed the appeal on the merits in all material respects, the party who failed on the appeal in the High Court would have a right to appeal to the Judicial Committee. I cannot believe that that was intended by the legislature and I am confirmed in this view by the fact that no authority can be produced in support of the contention put forward by the learned vakil for the appellants though the situation which occurs in this case, must have occurred many times in the past.

In the case of *Thakur Baldeo Baksh Singh v. Thakur Lalji Singh and others* (1) this question was considered.

The learned Officiating Judicial Commissioner who delivered the judgment stated as follows :—" It appears to me that we shall be doing no violence to the language of section 596 of the Code of Civil

(1) (1906) 10 Oudh cases, 65.

Procedure if we hold that the words "affirms the decision of the Court immediately below" relate to the subject matter of the suit. The costs of the suit claimed by the plaintiff are never taken into account in considering whether the subject matter of the suit in the Court of first instance amounted to Rs. 10,000 for the purpose of the first clause of section 596 of the Code of Civil Procedure."

"In my opinion the plaintiff is not entitled to appeal merely because the two Courts differed on the question of costs."

The learned Commissioner was dealing with section 596 of the Code of Civil Procedure, which was then in force: but the material words in that section do not differ from the words in section 110 of the Code of Civil Procedure 1908.

I agree with that part of the judgment. In this case the High Court merely exercised its discretion as regards the costs of the suit in the lower Court and it entirely confirmed the decision of the lower Court on the merits of the case; consequently in my judgment the decree appealed from affirmed the decision of the Court immediately below the High Court within the meaning of section 110 of the Code of Civil Procedure.

As regards the second question, *viz*:—Whether there is a substantial question of law involved, I have read the judgment of my learned brother Mr. Justice Richardson and it is clear from that judgment that the question was entirely one of fact and that there is no substantial question of law involved.

For these reasons, in my judgment, the application must be refused with costs, three gold mohurs.

**Mookerjee J.**—I agree.

A. T. M.

*Application refused.*

CIVIL.

1920.

Chaitanya

v.

Yusuf.

Sanderson C. J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

CIVIL.

1921.

June, 29, 30,  
July, 1, 5.  
August, 22.

SARAT CHANDRA MAITI AND OTHERS

v.

BIBHABATI DEBI AND OTHERS\*

*Title, declaration of—Limitation—Attachment under section 146 of Code of Criminal Procedure (Act V of 1898)—Adverse possession—Misdescription of defendant as minor—Certificated guardian proposed as guardian ad litem—His consent, if necessary—Civil Procedure Code (Act XIV of 1882) Sec. 443—Rent suit—Representation—Decision of Court, to rest on what—Statement in judgment as to admission, how to be refuted.*

When a property is attached under section 146 of the Code of Criminal Procedure, it passes into legal custody, and during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law. *Brojendra v. Abdul Rasac* (1) followed. *Deo Narain v. Webb* (2) dissented from.

The intervention of public authorities for the preservation of peace, operates in the same way as the *vis major* of the floods, and the constructive possession of the land is thereafter, if anywhere, in the true owner.

There can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner.

Where the defendant was misdescribed as a minor and a guardian *ad litem* was appointed, although he had in fact attained majority, a suit subsequently instituted by him to set aside the decree should be dismissed, on the ground that he was bound by the decree in the former suit, inasmuch, though aware of the suit and the execution proceedings which resulted in the sale, (as order for the appointment of a guardian *ad litem* was made after notice to the alleged minor and the proposed guardian), he still allowed his guardian to conduct the defence and the proceedings on his behalf as guardian for the suit.

In the absence of a provision in the Code of Civil Procedure of 1882 corresponding to order 32 rule 4 sub-rule (3) of the Code of 1908, where a certificated guardian was proposed for appointment as guardian *ad litem*, the Court might, unless he declined the appointment, presume his consent.

A person can, under certain circumstances, represent the tenancy so as to entitle the landlord to obtain in a suit brought against that person, a decree binding upon all the persons interested in the tenancy.

\* Appeal from Original Decree No. 216 of 1919, against the decision of Babu Sris Chandra Chaudhuri, Subordinate Judge of Midnapore, dated the 28th June 1919.

(1) (1915) 22 C. L. J. 283.

(2) (1900) I. L. R. 28 Calc. 86.

The decision of a Court should rest not upon suspicion but upon legal grounds established by legal testimony : *Mina Kumari v. Bijoy Singh* (1).

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the appellate Court, specially in the absence of an affidavit by the vakil who appeared in the Court of first instance. In cases of this character, where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment.

Appeal by the Defendants.

Suit for declaration of plaintiffs' title and for consequential relief.

The material facts appear from the judgment.

*Babus Mahendra Nath Ray* and *Santosh Kumar Pal* for Defendants Nos. 3 to 5 Appellants.

*Mr. J. C. Hazra*, *Babus Mahes Chandra Banerjee* and *Pramatha Nath Banerjee* for Defendants Nos. 7 to 12 Appellants.

*Dr. Dwarka Nath Mitter*, *Babus Probodh Chandra Chatterjee* and *Rama Prasad Mookerjee* for the Plaintiffs Respondents.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—The subject matter of the litigation which has resulted in this appeal is a large tract of what is called Jalpai land of the abolished salt department, situated in the district of Midnapur within the zemindari of the Raja of Mahisadal. On the 8th July, 1864, one Sunder Narain Maiti obtained a settlement from the zemindar in respect of an estimated area of 400 bighas within specified boundaries. After the death of the original grantee, his son Taraprosad Maiti, on the 10th November 1874, took a confirmatory lease of 513 bighas approximately, for the benefit of the family whereof he was the senior member. The relationship of the members of this family may be gathered from the following genealogical table :

CIVIL.

1921.

*Sarat Chandra*  
v.  
*Bibhabati Debi.*

August, 22.

(1) (1916) L. R. 44 I. A. 72 ; I. L. R. 44 Calc. 662 ; 25 C. L. J. 508.

CIVIL.

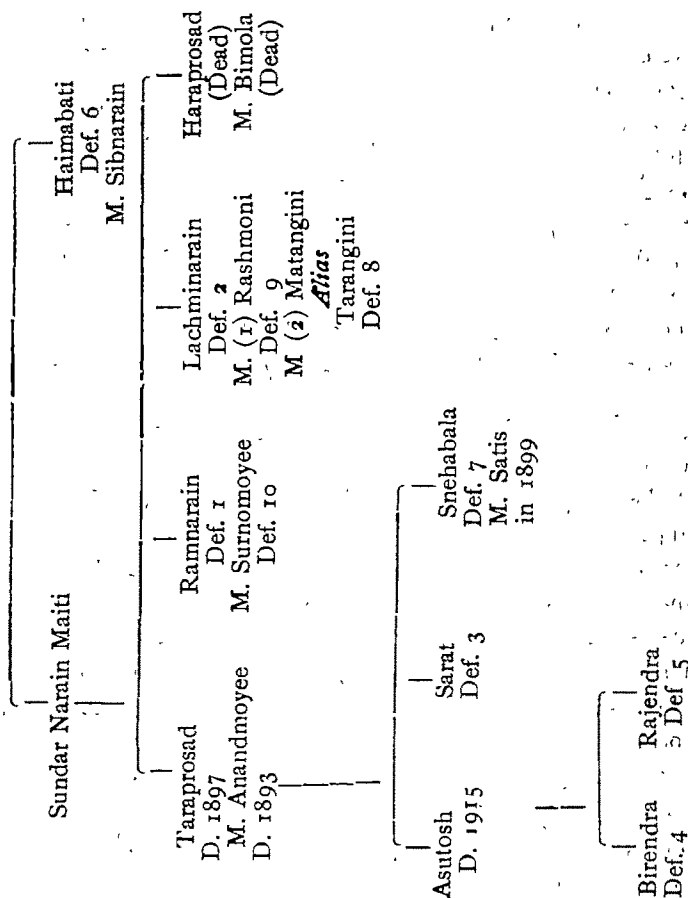
1921.

Sarat Chandra

v.

Bibhabati-Debi.

Mookerjee, J.



The Maitis defaulted to pay rent, with the result that on the 26th August, 1903, the zemindars obtained a decree for rent against them. The decree was put into execution, and at the auction sale which followed, the landlords became the purchasers on the 16th January, 1904. The sale was confirmed on the 18th February, 1904, and possession was delivered on the 10th April, 1904. On the 30th January, 1909, the plaintiff obtained settlement from the Raja. The defendant, however, disputed her right to take possession. This led to the institution of proceedings under sections 107 and 145 of the Criminal Procedure Code which terminated in an order made on the 28th September, 1912, for attachment of the disputed lands under section 146 of the Criminal Procedure Code. The plaintiff



thereupon instituted the present suit on the 9th October, 1917 for declaration of her title to the attached land under the lease granted to her on the 30th January, 1909 and to the sums of money held by the Collector as receiver from the date of his appointment. There were two sets of defendants to the suit, namely, defendants 1 to 5 and defendants 7 to 12. The first set repudiated the claim on the ground that it was barred by limitation and that the decree for rent did not affect their rights under the lease of the 10th November, 1874. The second set urged that they held tenancies subordinate to the lease of the 10th November, 1874 and were consequently entitled to remain in occupation, notwithstanding the sale held on the 16th January, 1904, in execution of the decree for arrears of rent. The Subordinate Judge overruled these contentions and declared the right of the plaintiff to direct possession of the disputed lands; the decree also made a consequential order as to the amounts held in deposit in the treasury. The defendants have appealed against this decree, and separate arguments have been addressed to the Court on behalf of the two sets of defendants who have united in one appeal. The grounds which emerge for consideration may be formulated as follows; first, that the suit is barred by limitation; secondly, that the decree for rent made on the 26th August, 1903, did not operate as a valid rent decree, as three of the persons interested in the tenancy created under the lease of the 10th November, 1874 were not represented before the Court in the rent suit; and, thirdly, that the tenancies set up by the second set of defendants were real and not fictitious as held by the Subordinate Judge.

As regards the first point, we are of opinion that the plea of limitation cannot prevail, in view of the decision of this Court in *Brajendra Kishore v. Abdul Razac* (1). That case is an authority for the proposition that when a property is attached under section 146 of the Criminal Procedure Code, it passes into legal custody, and during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrongdoer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law. These results are deducible from the decisions of the Judicial Committee in *Agency Co. v. Short* (2); *Secre-*

CIVIL.

1921.

Sarat Chandra  
v.  
Bibhabati Debi.  
*Mookerjee, J.*

(1) (1913) 22 C. L. J. 283.

(2) (1888) 13 App. Cas. 793.

CIVIL.

1921.

Sarat Chandra

v.  
Bibhabati Debi

Mookerjee, J.

*tary of State for India v. Kristomani Gupta* (1), and *Kumar Basanta Ray v. Secretary of State for India* (2). The intervention of the public authorities for the preservation of peace, operates in the same way as the vis major of the floods, and the constructive possession of the land is thereafter, if anywhere, in the true owner. While the Collector holds possession for the benefit of the rightful owner, no possession on the part of the wrong-doer, can by legal fiction, be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner. From this standpoint, no question of limitation really arises, because less than twelve years elapsed between the confirmation of the rent sale on the 18th February 1904 and the attachment by the Magistrate on the 28th September 1912. If during the attachment, the seisin or legal possession is in the true owner, the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. But it has been urged that this view cannot be reconciled with the decision in *Deo Narain v. Webb* (3). This may be conceded; it must not be overlooked, however, that the decision in that case was pronounced in 1900, when the judgment of the Full Bench in *Kally Churn Sahoo v. Secretary of State* (4) was still considered good law. That Full Bench decision was overruled by the judgment of the Judicial Committee in *Secretary of State for India v. Kristomani* (1). The substance of the matter is that the doctrine that there can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner, which is now regarded as an elementary proposition by reason of the successive decisions of the Judicial Committee in *Agency Co. v. Short* (5); *Secretary of State for India v. Kristomani* (1), and *Kumar Basanta v. Secretary of State for India* (2) was by no means familiar when the case of *Deonarain v. Webb* (3) was decided; that case cannot consequently be treated as binding authority, as it overlooks a fundamental principle enunciated by the Judicial Committee. We thus see no reason to depart from the decision in *Brajendra Kishore v. Abdul Rasac* (6), and the first ground must be overruled as untenable.

(1) (1902) L. R. 29 I. A. 104; I. L. R. 29 Calc. 518.

(2) (1917) L. R. 44 I. A. 104; I. L. R. 44 Calc. 858; 25 C. L. J. 487.

(3) (1900) I. L. R. 28 Calc. 86.

(4) (1881) I. L. R. 6 Calc. 725.

(5) (1888) 13 App. Cas. 793.

(6) (1915) 22 C. L. J. 283.

As regards the second point, it has been urged that the decree for rent made on the 26th August, 1903, did not operate as a valid rent decree, as three of the persons interested in the tenancy at that time were not represented before the Court in that suit. These three persons were Asutosh Maiti (the late father of the fourth and fifth defendants in this suit), Saratchandra Maiti (the third defendant in this suit) and Bimala (the widow of Haraprasad Maiti). As regards Asutosh, the objection taken is that at the date of the institution of the rent suit, he had in reality attained majority, but was misdescribed as a minor represented by his uncle and certificated guardian Ramnarayan Maiti (the first defendant in this suit). As regards Saratchandra who was a minor at the date of commencement of the rent suit, the objection taken is that his uncle and certificated guardian Ramnarayan Maiti was appointed his guardian for the suit without consent. As regards Bimala, the objection taken is that she was not joined as a party to the rent suit, though the interest of her husband in the tenancy must have devolved on her by right of inheritance.

As regards the objection in respect of Asutosh Maiti, a question has been raised regarding the admissibility of the recital, in the guardianship certificate, of the date when he would attain majority. Reference has been made to the decisions in *Satis Chunder v. Mohendra Eal* (1) and *Gunja Kuar v. Ablakh Pande* (2) to show that such evidence would not be admissible under section 35 of the Indian Evidence Act. These cases were doubted in *Monindra v. Ram Krishna* (3) where the recital in a guardianship certificate was held admissible under section 32 (5), on an interpretation of the section which receives support from the decision of the Judicial Committee in *Mohamed v. Yeoh* (4) and conforms to the earlier decisions in *Ramchandra v. Jogeswar* (5); *Dhanmull v. Ram Chunder* (6), and *Oriental G. S. L. A. Co. v. Narsinha* (7). But we cannot overlook the fact that in the present case the recital was based presumably on the statement of the applicant for guardianship, namely, Ramnarain Maiti, who is a party to the suit and could have been examined as a witness in this litigation: *Achyutananda v. Jagannath* (8). There is, however, other evidence on the point, and we shall consequently proceed on the assumption that at the date of the institution

CIVIL.

1921.

Sarat Chandra

v.  
Bibhabati Debi.

Mookerjee, J.

(1) (1890) I. L. R. 17 Calc. 849; (2) (1896) I. L. R. 18 All. 478.

(3) (1915) 21 C. L. J. 621.

(4) (1916) L. R. 43 I. A. 256; [1916] 2 A. C. 575.

(5) (1893) I. L. R. 29 Calc. 758. (6) (1890) I. L. R. 24 Calc. 265.

(7) (1901) I. L. R. 25 Mad. 183. (8) (1914) 21 C. L. J. 96.

Civil.

1921.

Sarat Chandra

Bibhabati Debi.

Mookerjee, J.

of the rent suit, Asutosh had already attained majority and was misdescribed as a minor. It is indisputable that he had notice of the suit, because orders for the appointment of a guardian *ad litem* are made only after notice to the alleged minor and the proposed guardian. In such circumstances, the principle of the decision in *Ramchari v. Duraisami* (1) applies. In that case, a defendant had been misdescribed as a minor and a guardian *ad litem* was appointed, although he had in fact attained majority. A suit subsequently instituted by him to set aside the decree was dismissed, on the ground that he was bound by the decree in the former suit, inasmuch, though aware of the suit and the execution proceedings which resulted in the sale, he still allowed his elder brother to conduct the defence and the proceedings on his behalf as guardian for the suit. This conclusion is manifestly well-founded on reason and is supported by the decisions in *Ganga Ram v. Mihin Lal* (2); *Tanguturi v. Hanumantha* (3); *Enuga v. Beswada* (4), and *Net Lal v. Kareem Bux* (5). We need not consider the effect of the institution of a suit by a person as the next friend of a plaintiff who is described as a minor, but is really a major. Upon that point, the Courts have been divided in opinion; *Taqi Jan v. Obaid-ulla* (6) and *Shanmuga v. Narayana* (7) favour a liberal view and sanction the necessary amendments to validate the suit; *Sheorania v. Bhaat Singh* (8) and *Saramma v. Seshayya* (9) adopt, on the other hand, a stricter view. In the case before us, there is abundant evidence that Asutosh was aware of the rent suit and of the execution proceedings consequent on the decree made therein. He never took steps to challenge the propriety of the decree up to the time of his death which took place in 1915. In our judgment, the decree made against him was not invalidated by the circumstance that he was misdescribed as a minor when he had in fact already attained his majority. The objection fails in so far as it is based on the ground that Asutosh was not properly before the Court in the rent suit.

As regards the objection in respect of Saratchandra Maiti, it has been urged that he was not properly represented in the rent suit, as Ram Narain Maiti, his certificated guardian, was appointed guardian for the suit, notwithstanding that upon service of notice he did not

(1) (1897-8) I. L. R. 21 Mad. 167.

(2) (1906) I. L. R. 28 All. 416.

(3) (1916) 20 M. L. T. 479.

(4) (1917) 17 Mad. W. N. 495.

(5) (1896) I. L. R. 23 Calc. 686.

(6) (1894) I. L. R. 21 Calc. 866.

(7) (1916) I. L. R. 40 Mad. 743.

(8) (1897) I. L. R. 20 All. 90.

(9) (1905) I. L. R. 28 Mad. 396.

appear to signify his acceptance of the office of guardian *ad litem*. It may be stated at the outset that the order-sheet in the rent suit is not available at this distance of time, and it is not possible, from an inspection of the record, to ascertain whether Ram Narain responded to the notice served upon him and whether the order for his appointment as guardian *ad litem* was made with his consent. The fact remains that the rent suit was decreed *ex parte* and there was no appearance on behalf of the defendants when the suit came up for final disposal on the 26th August, 1913. This does not conclusively prove that there was no appearance on behalf of the defendants at an earlier stage. But let us assume that Ram Narain Maiti, the proposed guardian, did not appear in response to the notice served upon him and yet he was appointed guardian *ad litem* of his nephew and ward, Sarat Chandra Maiti. The appellants contend that such appointment was void and inoperative and that consequently Sarat Chandra Maiti must be considered not to have been represented at all at the trial. The validity of this contention must be tested with reference to the provision of the Civil Procedure Code of 1882 which was in force when the rent suit was tried. Section 443 of the Code of 1882 provided as follows :

"Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case."

This was an exact reproduction of section 443 of the Civil Procedure Code of 1877. The following paragraph was added to section 443 of the Code of 1882 by section 53 B of the Guardians and Wards Act 1890 :

"Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him, or one of them, as the case may be, to be the guardian for the suit under this section, unless it considers for reasons to be recorded by it, that some other person ought to be so appointed."

Section 443, in this enlarged form, has now been reproduced as order 32, rule 4, sub-rule (2) of the Civil Procedure Code of 1908. In the Code of 1908, there is, in order 32, rule 4, sub-rule (3), an additional provision to the effect that no person shall, without his consent, be appointed guardian for the suit. There was no such provision in the Code of 1882 ; but it has been held in the case of

CIVIL.

1921.

Sarat Chandra

v.

Bibhabati Debi.

Mookerjee, J.

Civ. 1.

1921.

Sarat Chandra

Bibhabati Debi.

Mookerjee, J.

*Jadow v. Chhagan* (1) which was followed in *Vasudev v. Krishnaji* (2), that the Civil Procedure Code did not empower a Court to appoint a person, against his or her will, to be a next friend or guardian *ad litem* of a minor. Sir Michael Westropp, C. J. observed that the words "no other person fit and willing to act as guardian for the suit" in section 456 of the Code of 1877 (as amended by section 73 of Act XII of 1879) indicated that the legislature did not intend to force the office of guardian *ad litem* on any person in *invitum*. The same words were reproduced in section 456 of the Code of 1882 and now find a place in order 32, rule 4, sub-rule (4) of the Code of 1908. These remarks, however, were made with reference to the appointment of a person as guardian *ad litem* who was not a certificated guardian. Consequently, the observations cannot be assumed to have been intended to apply to a person who had, on his own application, been appointed a guardian of the minor "by competent authority." Indeed, in the case of *Issur Chander v. Nobo Krishito* (3), it was ruled on the authority of the decisions in *Dhondiba v. Kusa* (4) and *Babaji v. Maruti* (5), that as no order for appointment of a guardian *ad litem* shall issue without the consent of the party appointed, if no relative or friend of the minor can be found who is willing to take out a certificate and appear as guardian, the Judge should appoint an officer of Court or some respectable nominee of the minor. This proceeds on the assumption that a person who, on his own application, has been appointed guardian of the person or property of a minor will be willing to discharge his duties towards his ward by acceptance of the office of guardian for the suit. The position under the Code of 1882, after its amendment in 1890, thus was that there was no specific prohibition against the appointment of a person as guardian for the suit without his consent, though there were judicial decisions, such as those mentioned in *Narendra v. Jogendra* (6), which interpreted the Code to signify that a person who was not a certificated guardian should not be so appointed without his consent. Where the person proposed to be appointed was a certificated guardian, the Court was bound to appoint him, unless it considered, for reasons to be recorded, that some other person ought to be so appointed. If no such reasons transpired on the application made by the plaintiff or on a representation made by the proposed guardian, the normal course for the Court to follow

(1) (1881) 1 L. R. 5 Bom. 306.

(2) (1895) 1 L. R. 20 Bom. 534.

(3) (1880) 7 C. L. R. 407.

(4) (1869) 6 Bom. H. C. R. 219.

(5) (1874) 1 L. R. 11 Bom. H. C. R. 182.

(6) (1914) 20 C. L. J. 469; 19 C. W. N. 537.

would be to make the appointment. This view cannot be taken as regards the provisions of the Code of 1908, which contains an express provision in order 32 rule 4 sub-rule (3) that no person shall without his consent be appointed guardian for the suit. This has been held to apply to all persons proposed to be appointed guardian *ad litem*, whether they be or be not certificated guardians of the minor; *Annada v. Upendra* (1) S. A. 2130 of 1919 decided by Mookerjee and Panton JJ. on the 5th August, 1921. In the absence of a provision in the Code of 1882 corresponding to order 32, rule 4 sub-rule (3) of the Code of 1908, we may reasonably hold that where a certificated guardian was proposed for appointment as guardian *ad litem*, the Court might, unless he declined the appointment, presume his consent. From this point of view Sarat Chandra must be deemed to have been represented by his certificated guardian as guardian *ad litem* in the rent suit. This is clearly not a case like that of *Tekait Krishna Prasad v. Motichand* (2) where proceedings were taken in Court without notice to any one representing the minor. The decision in *Narsingh v. Jahi Mistry* (3) also is distinguishable. There the mother of the infant was proposed for appointment as guardian *ad litem* of her infant son; she did not respond to the notice served upon her and yet the Court proceeded to appoint her, although the father was the certificated guardian; see also *Raghubar v. Bhikya* (4) and *Beni Prasad v. Lajja Ram* (5). The objection against the decree in the rent suit thus fails in so far as it is based on the ground that Sarat Chandra was not properly represented before the Court.

As regards the objection in respect of Bimala, there are no materials on the record to show whether she was in joint enjoyment of the interest of her husband in the leasehold property. The tenancy stood, as we have seen, in the name of Tara Prasad Maiti under the lease of the 10th November, 1874. After his death in 1897, the landlord brought a suit for arrears of rent against the male members of the family, namely, the two sons of Tara Prasad and his two surviving brothers Ram Narain and Luchmi Narain: *Khetter Mohan v. Pran Kristo* (6). In such circumstances, the vital question is whether the tenure was completely represented by the defendants on the record. Upon that aspect of the case, it is plain that the appellants have no substantial grievance. This is clearly a case

CIVIL.

1921.

Sarat Chandra

v.

Bibhabati Debi.

Mookerjee, J.

(1) (1921) 34 C. L. J. 293.

(2) (1913) L. R. 40-1. A. 140; 1. L. R. 40 Calc. 635; 17 C. L. J. 573.

(3) (1911) 15 C. L. J. 3.

(4) (1885) 1. L. R. 12 Calc. 69.

(5) (1916) 1. L. R. 38 All 453.

(6) (1899) 3-C. W. N. 371.

CIVIL.

1921.

Sarat Chandra  
v.  
Bibhabati Debi.  
Mookerjee, J.

where the doctrine of representation, recognised in *Nitayi Behari v. Hari Govinda* (1) ; *Gagan v. Abejan* (2) ; *Profulla v. Salimulla* (3) and *Ban Behari v. Khatterpal* (4), may be invoked. If we examine the constitution of the rent suit, we find that Ram Narain and Lachmi Narain, the two brothers of Tara Prasad, were joined, as defendants. Ram Narain was described as the certificated guardian of Asutosh and Sarat. None of them contested the claim. The interest of Ram Narain as a co-sharer of the tenancy, was identical with that of his nephews. The evidence shows that the defendants were aware of the suit, the decree and the execution proceedings. They did not contest the claim, because there was no defence available. Although many years have elapsed since the decree was made and the sale was held, no endeavour has ever been made, to reopen the proceedings; *Ganpat v. Bindbasini* (5) ; and in the present litigation it has not even been hinted that the arrears claimed in the rent suit were not due in fact, or that the decree was erroneous or otherwise unjust in any particular. In such circumstances, we should look, not so much to the outward form of the proceedings in the suit as to the substantial justice of the case, as was done by the Judicial Committee in *Hari Saran v. Bhubaneswar* (6) where reference is made to the decision of the Judicial Committee in *Dhurm Das v. Shama Soondri* (7) and of a Full Bench of this Court in *Suresh Chunder v. Jugut Chunder* (8). Tested from this point of view there is no foundation for the argument that the tenancy was not adequately represented in the rent suit and that the decree made therein did not operate as a rent decree. The second ground urged by the appellants cannot consequently be maintained.

As regards the third point, it has been urged that the tenancies set up by the second set of defendants were real and not fictitious as held by the Subordinate Judge. The pedigree set out above shows that defendant 7 is the sister of defendant 3, defendants 8, and 9 are the wives of defendant 2 and defendant 10 is the wife of defendant 1. These defendants allege that they are tenants under their relations, and that the tenancies were created in their favour shortly after the settlement was obtained from the zemindar. Defen-

(1) (1899) I. L. R. 26 Calc. 677. (2) (1911) 14 C. L. J. 180.

(3) (1918) 23 C. W. N. 590.

(4) (1911) 16 C. W. N. 259; I. L. R. 38 Calc. 923.

(5) (1920) L. R. 47 I. A. 91; I. L. R. 47 Calc. 924.

(6) (1888) L. R. 15 I. A. 195; I. L. R. 16 Calc. 40.

(7) (1843) 3 M. I. A. 229; 6 W. R. P. C. 43.

(8) (1886) I. L. R. 14 Calc. 294.



dants 11 and 12 claim to hold usufructuary mortgages executed in their favour on the 5th July, 1902 by defendant 10 and defendant 8 respectively. The Subordinate Judge has held that the alleged tenancies had no real existence and were created by the tenure-holders in favour of the female members of their family with a view to keep down the amount of cesses leviable on the assets as also to save a fragment in the event of an execution sale. The tenancies are mentioned in a road cess return submitted by Tara Prasad Maiti on the 24th June, 1875 and this may lend some support to the first hypothesis just mentioned. The circumstances that the tenancies were all in favour of the ladies of the family and that the rents were unusually small in comparison with the rent payable to the zemindar are undoubtedly grounds for suspicion. But as was said by Sir Lawrence Jenkins in *Mina Kumari v. Bijay Singh* (1), the decision must rest, not upon suspicion but upon legal grounds established by legal testimony. The Subordinate Judge has kept this principle in mind and has carefully traced the history of each of these tenancies. He has shown that there is no satisfactory evidence of possession by the alleged lessees. This, indeed, was the crucial test, and it is significant that none of the female defendants has ventured to give evidence in support of her claim, while both Ram Narayan and Lakshi Narayan have kept away from the witness-box, although they are the only persons who could have been expected to give valuable evidence, from personal knowledge, as to the creation and enjoyment of these tenancies. Nor have the account books been produced to show that the cultivation was carried on by tenants settled on the land by the ladies and that the ladies themselves received the profits. It is not necessary to review in detail the evidence relating to each of these tenancies, which has been commented upon minutely by counsel on both sides and has been carefully scrutinised by us. It is sufficient to state that our attention has not been drawn to any material misstatement of the effect of the evidence as set out in the judgment of the Subordinate Judge. We hold, accordingly, in concurrence with the Subordinate Judge, that the tenancies in the names of the ladies were fictitious and that they were never in possession as tenants under the tenure-holders. The third ground consequently fails like the first and the second.

Finally a question has been raised as to the identity of the lands in suit with the lands comprised in the lease of the 10th November, 1874, and the sale certificate of the 18th February, 1904. This

(1) (1916) L. R. 44 I. A. 72 ; I. L. R. 44 Calc. 662 ; 25 C. L. J. 508.

CIVIL.

1921.

Sarat Chandra

v.  
Bibhabati Debi.

Moherjee, J.

CIVIL.

1921.

Sarat Chandra  
v.  
Bibhabati Debi.  
Mookerjee, J.

question was raised in the eleventh issue in the Court below. The Subordinate Judge states in his judgment with reference to that issue that "the disputed lands are *admittedly* included in the tenure and so they are included in the sale certificate." The appellants have, however, contended that this statement must have been made by the Subordinate Judge under a misapprehension and that no such admission was made before him. But this allegation is an unproved assertion which we are not prepared to accept. In the case of *Damodar Narayan v. Dalglish* (1), it appeared from the judgment of the Subordinate Judge that at the trial before him it was admitted with regard to some of the lands in suit that those lands were the private lands of the proprietor; the case proceeded before the Subordinate Judge and was dealt with by him on the footing of that admission. On appeal, this Court went behind the admission. Sir Arthur Wilson observed that the High Court was in error in going behind the admission and re-opening the question whether the smaller area was the private land of the proprietor. Again, in *Nellavadiu v. Subramaniya* (2), Mr. Justice Sadasiva Iyer observed that a statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the appellate Court, specially in the absence of an affidavit by the vakil who appeared in the Court of first instance. It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. This course was not pursued in the case before us nor is the proof of the allegation that the trial Judge was under a misapprehension. We must, consequently, hold that the appellants cannot be permitted to reopen the question in this Court. But we may add that we heard the appellants, upon the merits, on this part of the case, and we did not feel at all impressed that there was any substance in the contention that the lands in suit were not lands included in the lease and the sale certificate.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1910) L. R. 38 I. A. 62; I. L. R. 38 Calc. 432; 13 C. L. J. 512; 15 C. W. N. 345.

(2) (1916) 31 M. L. J. 269.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

BHUDEB MOOKERJEE AND OTHERS

*v.*

KALACHAND MALLIK AND ANOTHER.\*

CIVIL.

1921.

August, 10, 23.

*Mandatory injunction—Specific Relief Act (I of 1877), Secs. 54, 55—Roots of tree penetrating neighbour's land—Sacred tree—'Obligation'*

As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance, under section 55 of the Specific Relief Act : *Lakshmi v. Tara Frosanna* (1).

Obligation may be taken to be a tie or bond which constrains a person to do or suffer something ; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances ; but in order that it may be enforced by a Court, it must be a legal obligation, and not merely moral, social or religious.

Refusal to grant a perpetual injunction to the plaintiffs to restrain the execution of a decree for the removal of a *nim* tree obtained by defendant No. 1 against defendant No. 2, on the ground that the tree is a sacred one, duly consecrated and worshipped by orthodox Hindu people of the locality and that its removal would be an invasion of their religion and would offend their religious sentiments, will not lead to a breach of an obligation that is, of a duty enforceable by law which the plaintiffs could compel the defendant to perform, within the meaning of section 54 of the Specific Relief Act

Appeal by the Plaintiffs.

Suit for permanent injunction.

The material facts appear from the judgment.

*Babus Amarendra Nath Bose and Nanda Lal Banerjee* for the Appellants.

*Babu Mohini Mohan Chakrabarti* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the plaintiffs in a suit for permanent injunction to restrain the execution of a decree obtained by the first defendant against the second defendant for the removal of

August, 23.

\*Appeal from Appellate Decree No. 816 of 1912, against the decision of Babu Lal Bihari Chatterjee, Subordinate Judge of Hughli, dated the 2nd February, 1921, reversing that of Moulvi Sayidur Rahaman, Munsiff of Hughli, dated the 31st March, 1920.

(1) (1904) 1, L. R. 31 Calc. 944 ; S C. W. N. 710.

CIVIL.

1921.

Bhudeb

v.

Kalachand.

Mookerjee, J.

a Nim tree. The tree stands on the boundary wall of the land of the second defendant, and its roots have penetrated into the adjoining wall of the house of the first defendant. The consequence has been that the wall has been cracked and the house has been injured. In these circumstances, the first defendant instituted a suit against the second defendant for a mandatory injunction for the removal of the tree and for damages. On the 30th May, 1917, that suit was decreed, and the first defendant became entitled to remove the tree unless the second defendant removed it within fifteen days. That decree was affirmed on appeal on the 22nd January, 1919. Thereupon, the plaintiffs instituted the present suit on the allegation that the tree, was a sacred tree, that it had been duly consecrated, that it was worshipped by the orthodox Hindu people of the locality, and, that its removal would be an invasion of their religion and would offend their religious sentiments. The Court of first instance decreed the suit, granted a permanent injunction and authorised the first defendant to take out within a month bricks from the wall on which the tree stands, thereby causing an open space between the tree and his wall, and place there an iron-plate between the tree and the walls to prevent penetration of roots into his wall in the future. Upon appeal, the Subordinate Judge has reversed this decision and dismissed the suit. In support of the present appeal, the plaintiffs have contended that a permanent injunction should be granted to prevent removal of the sacred tree in execution of the decree.

There is no room for controversy that the decree was made by a Court of competent jurisdiction and was based on well-established legal principles. The decision in *Lakshmi Narain v. Tara Prosanna* (1) affirms the proposition that as every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance, under section 55 of the Specific Relief Act. In support of this view, reference was made to the decision of the House of Lords in *Lemmon v. Webb* (2) which affirmed that of the Court of Appeal in *Lemmon v. Webb* (3). The view taken there had been propounded three centuries earlier in *Norris v. Baker* (4).

(1) (1904) 1. L. R. 31 Calc. 944; 8 W. N. 719.

(2) (1895) App. Cas. 1.

(3) (1894) 3 Ch. 1.

(4) (1613) 1 Rolle 354, Bridg. 47. Sub nomine *Morrice v. Baker*. 3 Bulst. 196.

(See also Viner's Abridgment Vol. XX p. 417). The same view has been affirmed directly or by implication in subsequent cases; amongst these may be mentioned *Smith v. Giddy* (1); *Cheater v. Cater* (2); *Mills v. Brooker* (3). This is by no means a singular rule of law and in this connection reference may be made to the Code Napoleon tr. Barrett: Art. 672 provided as follows: "He whose property the branches of a neighbour's trees overhang, may force the latter to cut such branches. If the roots extend into his heritage, he has the right of cutting them himself." Art. 673 was in these terms: "Trees growing in a party hedge are party like the hedge; and each of the two owners has the right of requiring that they be cut down". Art. 673 of the French Civil Code (tr. Wright) contains the following provision: "A person over whose property the branches of a neighbour's trees grow can compel such neighbour to cut them. Fruit that falls naturally from such branches belong to the owner of the soil over which they grow. A person has the right to cut the roots of trees belonging to an adjoining owner which grow into his land. The right to cut the roots or have the branches but cannot be lost by prescription (non-user)." See also Pothier; *Traité de contract de societé*, second Appendice, Art. 243. (Oeuvres Ed; Bugnet, 1861, Vol. 4, p. 332); Huq, *Commentaire du Code Civil*, Vol. 4, p. 457; Wang, *German Civil Code*, Art. 910; Schuster, *German Civil law*, p. 388.

On what principle, then, can the plaintiffs demand that a perpetual injunction should be granted to prevent the execution of the decree? Under section 54 of the Specific Relief Act a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether, expressly or by implication. The plaintiffs must, consequently, specify the obligation which exists in their favour and would be infringed by the execution of the decree held by the first defendant against the second defendant. The plaintiffs can succeed only if they can establish, first, that the first defendant is under an obligation to keep on her land a tree considered sacred by the plaintiffs, even though the tree does damage to the property of the adjoining owner, and, secondly, that the second defendant is under an obligation to acquiesce in the continued existence of such a tree on the land of the adjoining proprietor even though such tree does damage to his own property. There must be obligations recognised by law. Section 3 of the Specific Relief Act states that the term obligation includes every

(1) (1904) 2 K. B. 448. (2) (1918) 1 K. B. 247.

(3) (1919) 1 K. B. 553.

CIVIL.  
1921.  
Bhudeb  
v.  
Kalachand.  
Moocherjee, J.

CIVIL  
1921.  
Bhudeb  
Kafachand.  
Mookerjee, J.

duty enforceable by law. We need not attempt an exposition of the full significance of the term obligation. But obligation may be taken to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but in order that it may be enforced by a Court, it must be a legal obligation, and not merely moral, social or religious. Neither authority nor principle has been invoked in support of the alleged legal obligation which the plaintiffs seek to impose upon the defendants on the ground that the tree has been consecrated and is held sacred by the plaintiffs as pious Hindus. We are not unmindful that certain trees are regarded with great veneration; *Dino Nath v. Pratap Chandra* (1); *Baiju Lal v. Bulak Lal* (2). Thus the Asvatha tree, the Tulsi plant and the Bilva tree are objects of worship. The first is sacred to Aditya, the second to Vishnu and the third to Shiva. The Kadamba tree in the Minakshi temple at Madura and the Jambu tree in the temple of Jamburkeswara near Trichinopoly are regarded with great sanctity. It may also be conceded that according to the Hindu Sastras, special religious merit accrues from the planting of trees on the road side, on the banks of tanks and in gardens or groves; and the Sastras also inculcate the fear of various punishments (by visitation of various sins) on those who fell trees; indeed special ritual is prescribed for the planting of trees for the benefit of the public (see Prannath Saraswati, Hindu Law of Endowments, Tagore Law Lectures, 1892, Chap. IX, pp. 230-246; see page 234, where the rules ordained by Manu and Vishnu for the infliction of punishment upon persons who destroy trees are quoted from Manu I-48, VIII-285, XI-143; 145; Vishnu V 55 59). But the view cannot be maintained that the rules so prescribed in the ancient texts are authorities in favour of the recognition of a legal obligation of the requisite character. We hold accordingly that the refusal to grant a perpetual injunction will not lead to the breach of an obligation, that is, of a duty enforceable by law, which the plaintiffs can compel the defendants to perform. No foundation has thus been laid by the plaintiffs for the grant of a perpetual injunction.

The result is that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1899) I. L. R. 27 Calc. 307.

(2) (1897) I. L. R. 24 Calc. 385 (387).

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr Justice  
Panton.

GOPAL KRISHNA SIL

v.

ABDUL SAMAD CHAUDHURI AND OTHERS.\*

Civil.

1921.

August, 1, 23.

*Prescription—Land for use as burial ground—Acquiescence—Easement, new species of—Customary right—Pleading—Custom, requisites of—Custom and prescription, difference between—Remand on issue not raised in pleadings.*

Land for use as a burial ground may be acquired through purchase or dedication. But law does not recognise that an easement by prescription can be created by the mere fact that dead bodies are placed in graves on the land of another and permitted to remain there for the prescriptive term.

The right to bury in a given tract of land cannot be deemed a right imposed for the beneficial enjoyment of land. There is no such thing as a dominant heritage to which the easement right can attach and the right to bury upon a tract of land in no sense falls within the general definition of the term "easement."

Where the owner of land has acquiesced in the burial of dead bodies on his property, apart from all questions of acquisition of title by adverse possession, a Court of justice may prevent the desecration of the graves.

The Court will not create a new species of easement specially if the easement claimed, constitutes a nuisance : *Hira Lal v. Lokenath* (1).

When a customary right is claimed, it should be specifically pleaded ; all the essential requisites to its validity and binding effect must be averred and the custom so pleaded must, when put in issue, be proved as laid.

When a plaintiff sets up a prescriptive right, he cannot in fairness to the defendant, be allowed to succeed on the basis of a customary right.

A custom must be immemorial, reasonable, continued without interruption since its immemorial origin, certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect : *Mahamaya v. Haridas* (2).

Custom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law.

Even if an appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the trial Court, this ought only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away : *Ram Chandra v. Secretary of State* (3).

\* Appeal from Appellate Order No. 17 of 1920, against an order of C Sells, Esq., Additional District Judge of Chittagong, dated the 15th August, 1919, reversing the decision of Babu Kunja Bihari Biswas, Additional Subordinate Judge of Chittagong, dated the 10th June, 1918.

(1) (1915) 19 C. W. N. 864.

(2) (1914) I. D. R. 42 Calc. 455 ; 19 C. W. N. 208 ; 20 C. L. J. 183.

(3) (1916) L. R. 43 I. A. 172 ; I. L. R. 43 Calc. 1104 ; 24 C. L. J. 276.

CIVIL.

1921.

Gopal

v.

Abdul.

Appeal by the Defendant.

Suit for establishment of prescriptive right to bury the dead in the disputed land, for a permanent injunction to restrain interference with such right and for incidental reliefs.

The material facts appear from the judgment.

*Dr. Sarat Chandra Basak* and *Babu Chandra Sekhar Sen* for the Appellant.

*Moulvi Nuruddin Ahmed* and *Babu Pares Chandra Sen* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

August, 23.

**Mookerjee, J.**—This appeal is directed against an order of remand made in a suit for the establishment of prescriptive right to bury the dead in the disputed land, for a permanent injunction to restrain interference with such right and for incidental reliefs. The subject matter of the litigation is a hillock which was included in the reserve forest of the Government up till 1907. In that year the defendant obtained a settlement from the Government and has since then been in possession. The plaintiffs who are moslem residents of the adjoining village of Talberia allege that the moslems of the locality have in the past buried the dead in the disputed tract, but were resisted by the defendant on the 26th October, 1914. They assert that from time immemorial and for more than a century the hillock has been used as a burial ground, openly, continuously, without interruption and as of right, and that they have thereby acquired prescriptive right therein. They accordingly instituted this suit on the 1st November, 1916 for the establishment and enforcement of the alleged prescriptive right. The defendant repudiated the claim as neither founded on fact nor sustainable in law. On these pleadings, twelve issues were raised. It is sufficient to refer to the eighth issue which was framed in the following terms: "Is, there any public or private easement?" The Subordinate Judge answered the question in the negative. He held that the evidence did not establish that the plaintiffs or the other villagers of Talberia had ever buried their dead in the hillock before 1911 and that the plaintiffs could not claim a right to use the land as a graveyard by prescription. In this view the Subordinate Judge dismissed the suit. Upon appeal it was argued before the District Judge that what the plaintiffs claimed was not a prescriptive right, but a customary right. The District Judge thereupon framed the following new issue and remanded the suit for



retrial. "Have the plaintiffs acquired a customary right to bury their dead in the suit land? If so, is this right valid to the extent that defendant must be restrained by a perpetual injunction from interfering with that right? And is that customary right to be held as existing over the whole of the suit land? If not, to which part of the suit land, if any, is that customary right to be held to exist?" The defendant has appealed against the order of remand.

No authority has been produced in support of the claim put forward in the plaint, namely, that the plaintiffs had acquired a prescriptive right to use the disputed land as a burial ground by reason of the interment of dead bodies therein for more than a century, openly, continuously, without interruption and as of right. Such a prescriptive right was asserted in the case of *Wooldridge v. Smith* (1); but was negatived by a Full Bench of the Missouri Supreme Court. Land for use as a burial ground may be acquired through purchase or dedication. But law does not recognise that an easement by prescription can be created by the mere fact that dead bodies are placed in graves on the land of another and permitted to remain there for the prescriptive term. The Indian Easement Act contains the following definition of an easement: "An easement is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in, or upon, or in respect of, certain other land not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner." By no stretch of language can the right to bury in a given tract of land be deemed a right imposed for the beneficial enjoyment of land. In such a case, there is no such thing as a dominant heritage to which the easement right can attach and the right to bury upon a tract of land in no sense falls within the general definition of the term "easement". It may be conceded that where the owner of land has acquiesced in the burial of dead bodies on his property, apart from all questions of acquisition of title by adverse possession, a Court of justice may prevent the desecration of the graves. But this does not justify the inference that the placing of dead bodies in graves upon the land of another creates an easement by prescription. Such an easement is unknown to law and it is well-settled that the Court

(1) (1912) 223 Missouri 190; 40 L. R. A. N. S. 752.

CIVIL.

1921.

Gopal

v.

Abdul.

Mookerjee, J.

CIVIL.

1921.

Gopal

v.

Abdul.

Mookerjee, J.

will not create a new species of easement specially if the easement claimed constitutes a nuisance : *Hira Lal v. Loke Nath* (1). In view of these difficulties, the plaintiffs set up a customary right to bury the dead on the disputed tract ; they may have been encouraged to put forward such a claim at the appellate stage by reason of the decision in *Mohidin v. Shivlingappa* (2). That case is an authority for the proposition that where a certain section of the moslem community had been for many years in the habit of burying their dead near a Darga on the land of the plaintiff who sued for an injunction to restrain them in future, the right of burial claimed by the defendants was not an easement but a customary right which being confined to a limited class of persons and a limited area of land was sufficiently certain and reasonable to be recognised as a valid local custom. We do not desire to express an opinion upon the view adopted in the case just mentioned. The question, when it arises may require careful consideration, whether a customary right of user of a place as a burial ground or a cremation ground may be acquired especially as against the Crown. Before such a custom can be recognised, it will be necessary to investigate whether it possesses what has been considered as the essential attributes of a custom, namely, that it must be immemorial, it must be reasonable, it must have continued without interruption since its immemorial origin, and it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect ; *Mahamaya v. Haridas* (3). But it is indispensable that when a customary right is claimed, it should be specifically pleaded ; all the essential requisites to its validity and binding effect must be averred and the custom so pleaded must when put in issue be proved as laid. When a plaintiff sets up a prescriptive right, he cannot in fairness to the defendant, be allowed to succeed on the basis of a customary right. The two are fundamentally distinct, for as has been well said, custom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law. The District Judge in this case has framed a new issue apparently under O. 41, r. 25, but this should not have been done as the new issue framed did not arise upon the pleadings. In this connection reference may be made to the decision of the Judicial Committee in *Ram Chandra v. Secretary of State for India* (4), where Lord Parker observed that even

(1) (1915) 19 C. W. N. 864.

(2) (1899) I. L. R. 23 Bom 666.

(3) (1914) I. L. R. 42 43 Calc. 455 ; 19 C. W. N. 208 ; 20 C. L. J. 183.

(4) (1916) L. R. 43 I. A. 372 ; I. L. R. 43 Calc. 1104 ; 24 C. L. J. 296.

if an appellate Court be deemed competent to remit a case for rehearing on an issue not raised in the pleadings nor even suggested in the trial Court, this ought only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away. In the present case, the respondents showed no ground whatever for the indulgence they claimed and obtained in the lower appellate Court; they did not suggest that they had been in any way taken by surprise or had discovered fresh facts of which they were unaware when the case was tried before the primary Court. They came into Court on a specific allegation of prescriptive right of a novel character. That case was completely met by the defendant and the Subordinate Judge came to the conclusion that the evidence of prescriptive user was in a large measure unreliable. When they went on appeal, they realised that the decision of the trial Court was unimpeachable both on the facts and the law, and accordingly set up a new case of customary right. If this case is entertained, the plaint must be amended and the defendant permitted to file a new written statement. The new case would then have to be tried on fresh evidence. This is a procedure which cannot be seriously defended.

The result is that this appeal is allowed, the order of the District Judge set aside and the decree of the Court of first instance restored with costs throughout.

A. T. M.

*Appeal allowed: Suit dismissed.*

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En

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*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

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KUSUM KUMARI DAS.

v.

DASARATHI SINHA.\*

*Family settlement—Hindu widow in possession, executing a deed of relinquishment—Posthumous son, if bound—Transaction—Administration of justice.*

A, by his first wife left a daughter C, and by his second wife B, a daughter D. At the time of his death, B, C and D were living, B being pregnant.

\* Appeals from Appellate order Nos. 372 and 373 of 1919, against the decision of Babu Krishna Kumar Sen, Subordinate Judge of Hughli, dated the 25th July, 1919, reversing that of Babu Sasi Bhushan Banerjee, Munsiff of Howrah, dated the 21st December, 1919.

CIVIL.

1921.

Gopal

v.

Abdul.

*Mookerjee, J.*

CIVIL.

1921.

*August, 3, 23.*

## CIVIL.

1921.

Kusum Kumari

v.  
Dasarathi.

Difference arose after the death of A between B and C as to the title to properties which stood in the name of C, but which it was alleged by B, really formed part of the estate left by her husband and was held by C only as ostensible owner. Ultimately, sixteen days before the birth of E, the posthumous son and the plaintiff in the case, a deed of relinquishment was executed between B and C. E represented by D as next friend, brought a suit for declaration of his title to all the properties left by his father, A, and for recovery of possession with mesne profits:

*Held*, that E was not bound by the deed of relinquishment.

In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or like ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore, or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner: *Syam Sundar v. Achan Kuar* (1) and other cases.

The rights of the posthumous son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth.

The posthumous son is not bound by an alienation by his mother, of his paternal estate before his birth.

An unborn child, though treated as born, when it is for its benefit to be so considered, is not ordinarily regarded as born for the benefit of third persons.

The title of the posthumous son must be deemed to relate back to the time of death of his father.

It is of the utmost importance to the right administration of justice that the substance and the real meaning of the parties and not the form of expression and the literal sense of the transaction are to be constantly kept in view as the basis of the decision: *Dhurm Das v. Shama Soondri* (2) and other cases.

Appeals by the Defendant.

Suit for declaration of title and for recovery of possession.

The material facts are stated in the judgment.

*Babu Bhupendra Kumar Ghose* for the Appellant.

*Babu Monmohan Bose* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—The subject matter of the litigation which has led up to these two appeals is the estate left by one, Premchand Sinha, who died on the 21st November, 1900. He had married twice. By his first wife, Nityamoyee, who died in his life-time, he had a daughter, Kusum Kumari, who had been already married and had

(1) (1898) L. R. 25 I. A. 183; 1 L. R. 21 All. 71.

(2) (1843) 3 M. I. A. 229; 6 W. R. P. C. 43.

a son, Haripada by name. By his second wife, Katyayini, he had a daughter, Subhasini, who was born on the 3rd June, 1899. His second wife was pregnant at the time of his death and gave birth to a posthumous son on the 18th May, 1901, who was subsequently named Dasarathi. The relationship of the parties is set out in the following genealogical table :

|                          |                          |
|--------------------------|--------------------------|
| Premchand Singha         |                          |
| Died 21st November, 1900 |                          |
| First wife               | Second wife              |
| Nityamayi (Dead)         | Katyayini                |
| Kusumkumari              | Def. 5                   |
| Def. 1                   |                          |
| Subhasini                | Dasarathi                |
| Born 3rd June.           | Plaintiff.               |
| Haripada                 | 1899 Born 18th May, 1901 |

Differences arose after the death of Premchand Sinha between his widow and her step-daughter as to the title to properties which stood in the name of the daughter, but which it was alleged by the widow, really formed part of the estate left by her husband and was held by the daughter only as ostensible owner. Ultimately, a deed of relinquishment was executed on the 2nd May, 1901 between the widow and her step-daughter. On the 20th November, 1915 the posthumous son represented by his sister as next friend, commenced this litigation for declaration of his title to all the properties left by his father and for recovery of possession with mesne profits. The claim rested on the hypothesis that the posthumous son was not bound by the settlement which had been effected a few days before his birth between his mother and his step-sister, on the assumption that his mother was entitled to the interest of a Hindu widow in the estate and her step-sister was one of the next reversioners. The claim was resisted by the step-sister, who was the first defendant, and by a purchaser at a sale in execution of a decree for arrears of rent, who was joined as the second defendant. The Court of first instance dismissed the suit on the ground that the plaintiff was bound by the deed of relinquishment. On appeal, the Subordinate Judge has taken the contrary view and has remanded the suit for investigation of the other points in controversy between the parties. The step-daughter and the execution-purchaser have preferred separate appeals. The substantial question which arises

Civil.

1921.

Kusumi Kumari

v.

Dasarathi.

Mookerjee, J.

CIVIL.

1921.

Kusum Kumari

v.

Dasarathi.

Mookerjee, J.

for consideration in these appeals is, whether the posthumous son is bound by the deed of relinquishment between his mother and step-sister, executed shortly before his birth.

The position of a posthumous son has not escaped the attention of authoritative writers on Hindu jurisprudence. Indeed, at one time, his rights were so much respected that when a son born after a partition had taken place between a father and his sons, the partition was opened up again in order to give him the share, which he would have had, if he had then been alive; Vishnu-XVIII-3; Yajnavalkya II-122. Reference may in this connection be made to *Krishna v. Sami* (1); *Narasimha v. Veerabhadra* (2); and *Rai Bishen Chand v. Asmaida Kuwar* (3). Jimutavahana went so far as to hold that the rule was still applicable where the property to be distributed was inherited from the grand-father; because distribution of such property was illegal so long as the mother was capable of bearing children, and, consequently, the rights of an afterborn child could not be prejudiced by the illegal act. *Dayabhaga* I-45, VII-10, *Raghunandan* II-30, 31, 36. This extreme view however is obsolete, and other writers, such as, *Manu* IX-9, 216; *Gautama* XXVIII-26; and *Narada* XIII-44, hold that a son born after a partition could only take his father's share, representing him to the exclusion of the previously divided brethren; *Nawal v. Bhagwan* (4). Vijnaneswara reconciles this conflict of opinion, holding that the latter texts lay down the general rule, while the former are limited to the case of a son, who was in his mother's womb at the time of partition. Jimutavahana takes the same view in cases where the partition is made, by the father, of his self-acquired property. Consequently, in all cases where the number of sons would add to the number of sharers, if the pregnancy be known at the time, the distribution should be deferred till its result is ascertained; if it is not known and a son is afterwards born, a redistribution must take place of the estate as it then stands. *Mitakshara* I-6, 1-12; *Dayabhaga* VII-4; *Yekeyamian v. Agniswarian* (5); *Kalidas v. Krishan* (6). If the father had divided the whole property among his sons, retaining no share for himself, it is said that the sons with whom partition has been made must allot, from their shares, a portion equal to their own, to an afterborn son, on the principle that the

(1) (1884) I. L. R. 9 Mad. 64.

(2) (1893) I. L. R. 17 Mad. 237.

(3) (1883) L. R. 11 I. A. 164 (169); I. L. R. 6 All. 560 (574).

(4) (1882) I. L. R. 4 All. 427.

(5) (1869) 4 Mad. H. C. R. 307.

(6) (1869) 2 B. L. R. F. B. 103 (118-121).

unborn son cannot be deprived of his share in the paternal estate by a prior partition; Vishnu as quoted by Jagannath, Colebrooke Book II 268; *Chengama v. Munisami* (1). The application of this principle is expressly limited to the case of partition between father and sons and is not extended to a son born to a separate co-parcener other than the father, of the family after partition. The texts cited are applicable only to the case of the son *en ventre sa mere* at the date of partition: *Ganapat v. Gopalrao* (2); *Shivajirao v. Vasant-rao* (3).

The anxiety thus evinced for the protection of the unborn son is reflected in the rules recognised in cases of succession. The right of succession, under Hindu Law, is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir. To this fundamental rule, there is an apparent exception in the case of a child already conceived and in the womb of its mother, and it is well-settled that a child, who is in the mother's womb at the time of the death is, in contemplation of law, actually existing and will on his birth divest the estate of any person with a title inferior to his own, who has taken in the meantime: See *Lakhi v. Bhairab* (4); *Keshub v. Bishnu Persaud* (5); *Berojali v. Nubokissen* (6); *Kalidas v. Krishan* (7); *Tagore v. Tagore* (8).

The favoured position which a child in embryo thus occupies under the Hindu Law, in respect of partition and succession is by no means singular, for whatever may have been the law in early times, it is a rule generally adopted in mature systems of jurisprudence that a child in embryo is to be considered as born, when it will be for its benefit so to be considered, although the question is not free from metaphysical difficulties whatever view we may accept on the subject. In the Roman Law, existence was, for certain purposes, assumed to begin before birth. Thus, although upon the authority of Ulpian (Dig. 25, 4, 1, 1): "The fruit of the body before it is born is part of the mother or the womb," and natural capacity for rights begins with the birth of men, that is, the complete separation of a living human being from the mother, Paul points

CIVIL.

1921.

Kusum Kumari

v.

Dasaratbi.

Mookerjee, J.

(1) (1896) 1. L. R. 20 Mad. 75.

(2) (1899) 1. L. R. 23 Bom. 636.

(3) (1908) 1. L. R. 33 B.M. 267.

(4) (1833) 5 Sel. Rep. 315 (New Ed. 369).

(5) (1860) Sev. 240.

(6) (1863) Sev. 238.

(7) (1869) 2 B. L. R. F. B. 103.

(8) (1872) L. R. I. A. Sup. vol. 47 (67); 9 B. L. R. 377 (397); 18 W. R.

CIVIL.

1921

Kutum Kumari

Dasarathi.

Mookerjee, J.

out the ways in which the embryo in the mother's womb is recognized by law. "Attention is bestowed upon that which is in the womb, just the same as if it had come to life, whenever a question arises as to the embryo's own privileges, although in no way benefiting another before it is born." Dig. 1, 5, 7. "Our speaking of him whose birth is anticipated as though he were in existence, is correct when the question is as to his own right," Dig. 50, 16, 231. "The ancients paid regard to the child in the womb in such way that they maintained all rights in its favour intact until the time of birth, as may be seen in the law of inheritance." Dig. 5, 4, 3. See Markby's Jurisprudence 132; Holland's Jurisprudence p. 83. Sohm's Institutes (Ledlie), Art. 20; Savigny, System, Art. 62; Mackeldy's Roman Law (Dropsie), Art. 669; Salkowski Roman Law (Whitfield), Art. 32; Goudsmit Pandects (Gould), Art. 21; Thibaut Jurisprudence (Lindley), Art. 103, and a valuable note thereon in the Appendix by the learned translator. Similarly, under the English Law, as Sir William Blackstone puts it "an infant in *ventre sa mere* is supposed to be born for many purposes; it is capable of having a legacy or a surrender of a copyhold estate made to it; it may have an estate assigned to it and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it were then actually born"; Commentaries, Vol. I-139; *Clarke v. Clarke* (1). That questions of considerable nicety may arise in the application of this doctrine to unforeseen combinations of events may be conceded, and one of the most curious cases in the books is probably that of *Walker v. G. N. R. Co.* (2), where the question of the liability of a carrier of passengers for injury to an unborn child came under consideration. But whatever difficulties may arise in the application of the principle, it is well-settled that an unborn child, though treated as born, when it is for its benefit to be so considered, is not ordinarily regarded as born for the benefit of third persons. See Savigny, System, Art. 62 (tr. Rattigan, p. 9; tr. Guenoux, II, p. 13) where he says: "This fiction is universally restricted for the benefit of the child, and no one else ought to be permitted to employ it for his own purposes." See also Voet, Com. Book I, Tit. V, Art. 5 (tr. Buchanan, p. 108), where it is pointed out that although those in the womb are considered as born, whenever it is for their advantage, this fiction of law ceases, if the advantage be not to those in the womb, but to third persons. See further the judgment of Lord Chancellor Westbury in *Blasson v. Blasson* (3), where it

(1) 1795) 2 H. Bl. 399.

(2) (1890) 28 L. R. Ir. 69.

(3) (1864) 2 DeG. J. and S. 665; 34 L. J. Ch. 18.



was said, "that the fiction or indulgence of the law, which treats the unborn child as actually born, applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and that it is limited to cases where *de commodis ipsius partus quaeritur*." Lord Chancellor Hardwicke, however, in *Wallis v. Hodson* (1), while noticing that the Civil Law confined the rule to cases in which it was for the benefit of the child to be considered as born, stated broadly the rule to be that such child was to be considered living to all intents and purposes. On these principles, we must regard it as well-settled that the title of the posthumous son must be deemed to relate back to the time of death of his father.

Reference has been made in the course of argument to the analogy of an adopted son who also, by a well-recognized fiction of law, enjoys, for many purposes, the rights and privileges to which he would have been entitled, if he had been in actual existence at the time of the death of the father; *Tarinee v. Bamun Das* (2); *Bamundoss v. Tarinee* (3). No useful purpose is likely to be achieved, however, by an endeavour to assimilate and to establish a complete analogy between the legal fictions applicable to cases of a posthumous son and an adopted son, as is well-illustrated by the futile attempt made in the case of *Tarinee v. Bamun Das* (2) to maintain the fanciful argument that a widow authorised to adopt a son was in a state of constructive pregnancy. As was ruled by this Court in *Harek Chand v. Bijoy Chand* (4), the title of a son adopted by a widow under authority from her husband does not relate back to the death of the husband, and when the adoption has taken place his fictitious birth in the new family cannot be antedated for all purposes. See also *Raghunadha v. Brozo Kishore* (5); *Bhubaneswari v. Nilcomul* (6); *Faizuddin v. Tincowri* (7); *Lakshmana v. Lakshmi* (8); *Hanmant v. Bhimacharya* (9). Consequently, we need not review the decisions which deal with the question, how far the adopted son may dispute the previous acts of the widow. There has been much divergence of judicial opinion on that subject, as is clear from the decisions in *Lakshman v. Radhabai* (10); *Moro v. Balaji* (11); *Ramakrishna v. Tripurabai* (12); *Ramkrishna v. Tripurabai* (13) and

CIVIL

1921.

Kusum Kumari.

Dasarathi.

Mookerjee, J.

(1) (1740) 2 Atk. 117.

(2) (1850) Beng. S. D. A. 533.

(3) (1858) 7 M. F. A. 161.

(4) (1905) 2 C. L. J. 87.

(5) (1876) L. R. 3 I. A. 154.

(6) (1885) L. R. 12 I. A. 137; I. L. R. 12 Calc. 18.

(7) (1895) I. L. R. 22 Calc. 565.

(8) (1881) I. L. R. 4 Mad. 160.

(9) (1887) I. L. R. 12 Bom. 105.

(10) (1887) I. L. R. 11 Bom. 609.

(11) (1894) I. L. R. 19 Bom. 809.

(12) (1908) I. L. R. 33 Bom. 88.

(13) (1911) 13 Bom. L. R. 940.

CIVIL.

1921.

Kusum Kumari

v.

Dasarathi.

Mokherjee, J.

*Sreeramulu v. Kristamma* (1); the case last mentioned has now been overruled by a Full Bench in *Vaidyanatha v. Savitri* (2). The result of the authorities as they now stand appears to be that an alienation made by the widow for legal necessity before adoption is valid and will bind the adopted son; but an alienation made without such necessity is good only up to the date of adoption; after that date, the alienor has no power to retain the property as against the adopted son and must deliver it to him. The rights of the adopted son are, for this purpose, deemed to spring into existence at the moment of his adoption and displace the rights of the widow; they do not await the determination of the widow's estate by her death as in the case of reversioners.

We are of opinion that the rights of the posthumous son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth. This view is not opposed to the decision in *Goura Chowdhraïn v. Chummun Chowdry* (3). In that case it was ruled that proprietary right is created by birth and not by conception; so that a child in the womb takes no estate; where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained; if the child be still born, the estate goes not to her heir but to the heir of the last owner. It must further be observed that the deed of compromise which was challenged by the posthumous son in that case, had been executed by his father, before his birth, and the Court declined to uphold the contention that a father was debarred from making an alienation while there was a possibility of his wife being *ençiente*, to say nothing of the contingency whether the child in *utero matris* would be a son or a daughter or be still born. This view, even if it be assumed to be correct in all its generality, does not militate against the conclusion that the posthumous son is not bound by an alienation, by his mother, of his paternal estate before his birth. In the case before us, there is the significant fact that the deed of relinquishment was executed by the mother two weeks before his birth. The Subordinate Judge has rightly pointed out that there was no necessity for this expedition and that the principle applicable to cases of family settlements cannot be rightly invoked in such circumstances.

It need not be disputed that in the absence of proof of mistake,

(1) (1902) I. L. R. 26 Mad. 143.

(2) (1917) I. L. R. 41 Mad. 75.

(3) (1864) W. R. Gap. No. 340.

inequality of position, undue influence, coercion, fraud or like ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner; *Syamsundar v. Achan Kuar* (1); *Bijoy Gopal v. Girindra* (2); *Upendra Nath v. Bindeshri Prosad* (3); *Khunnilal v. Gobind* (4); *Hiran v. Sohan* (5); *Bihari Lal v. David* (6); *Keramatulla v. Keramatulla* (7); *Kokla v. Piari Lal* (8); *Shyam Lal v. Rameswari* (9); *Rajendra v. Nibaran* (10). But the cases which hold that a minor may be bound by a family settlement effected *bona fide* and for his benefit by his guardian, are clearly distinguishable on the ground that the settlement put forward was effected on behalf of the infant; to this class belong the decisions in *Keramatulla v. Keamattulla* (7); *Abdul v. Mahomad* (11), *Viswanathaswami v. Kamulammal* (12); *Prakateni v. Koram* (13), and *Anantanarayana v. Savithri* (14). In the case before us, the settlement was not effected on behalf of the infant, who had not been born at the time of the negotiations or the execution of the deed. We are not unmindful of the principle, repeatedly emphasised by the Judicial Committee, that it is of the utmost importance to the right administration of justice that the substance and the real meaning of the parties and not the form of expression and the literal sense of the transaction are to be constantly kept in view as the basis of the decision; *Dhuram Das v. Shama Soondri* (15); *Hunoomanpersaud v. Babooee Munraj* (16); *Harisaran v. Bhubaneswari* (17). This doctrine, however, is plainly of no assistance to the appellants. When the deed was executed, the possible birth of a male heir to the deceased was not kept in view. The settle-

(1) 1898. L. R. 25 I. A. 183; I. L. R. 21 All. 71.

(2) (1914) 1 I. L. R. 41 Calc. 793; 18 C. W. N. 673; 19 C. L. J. 620.

(3) (1915) 23 C. L. J. 451; 20 C. W. N. 210.

(4) (1911) L. R. 38 I. A. 87; I. L. R. 33 All. 356; 13 C. L. J. 575.

(5) (1914) 18 C. W. N. 929 P.C. (6) (1913) I. L. R. 35 All. 240.

(7) (1918) 23 C. W. N. 118. (8) (1913) I. L. R. 35 All. 501.

(9) (1913) 23 C. E. J. 82. (10) (1919) 25 C. W. N. 859.

(11) (1916) 19 M. L. T. 346. (12) (1915) 30 M. L. J. 451.

(13) (1912) Mad. W. N. 532.

(14) (1911) I. L. R. 36 Mad. 151.

(15) (1843) 3 M. I. A. 229; 6 W. R. P. C. 43.

(16) (1856) 6 M. I. A. 393; 18 W. R. 81 note.

(17) (1888) L. R. 15 I. A. 195; I. L. R. 16 Calc. 40.

CIVIL.

1921.

Kusum Kumari

v.

Dasarathi.

Mookerjee, J.

**CIVIL.**

1921.

Kusum Kumari

v.

Dasarathi.

Mookerjee, J.

ment was effected at a time when the widow was assumed to be the holder of the estate for life and the immediate reversioners were her daughter and step-daughter. If the child in the womb should be still born, the relative position of the parties would not be altered in any way. If the child should turn out to be a daughter, the relative position would not be affected in substance, though the number of reversionary heirs would be increased from two to three. On the other hand, if the child should turn out to be a son, the estate would vest absolutely in him; the widow of the last owner would have no interest therein and her daughter and step-daughter would not be reversioners at all. In view of this aspect of the case, it would, indeed, be a bold fiction to hold that a deed executed between two ladies at a time when one was ostensibly the widow in possession as heiress-at-law to her husband and the other was one of the reversionary heirs, was in essence a transaction carried out for the benefit of an unborn son whose birth would destroy the rights, present and contingent, of both the parties to the instrument. We hold accordingly that the Subordinate Judge has correctly held that the plaintiff is not bound by the deed.

The result is that the order of remand made by the Subordinate Judge is confirmed and the appeals are dismissed with costs.

A. T. M.

*Appeals dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

KRISHNA KISOR DE

v.

NAGENDRABALA CHAUDHURANI.\*

CIVIL.

1921.

May, 31.

June 1, 2, 14.

*Mortgage—Recital as to payment of consideration—Stranger to deed—Burden of proof—Burden of proof, question as to, when arises—Mortgage notified turns out to be invalid—Mortgage accrues in whose favour—Consideration not paid in full—Bond, validity of, if affected—Deed executed by purdanashia lady—Principle—Document, alteration in, after execution, when material—Immaterial alteration—Court's decision to rest on what.*

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the *onus* lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue: *Kaleepershad v. Rajah Sahib Perhlad* (1) and other cases. When the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case: *Brajeshware v. Budhanuddi* (2) and other cases.

The question of *onus* of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof becomes immaterial, and importance should not be attached to the question on whom the initial *onus* lay: *Kundal Lal v. Begamunnisa* (3) and *Seturatnam v. Venkata* (4).

The validity of a bond is not affected by the fact that the consideration recited was not paid in full, the bond is operative to the extent of the sum actually advanced: *Bajrangī v. Udit Narain* (5).

Either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed: *Hukumchand v. Hirralal* (6).

If the mortgage notified turns out to be invalid, the benefit is taken by the purchaser, and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage; and the purchaser is

\*Appeal from Original Decree No. 111 of 1920, against the decision of Babu Kumudini Kanta Ray, Subordinate Judge of Howrah, dated the 28th February, 1920.

(1) (1869) 12 M. I. A. 282.

(2) (1880) I. L. R. 6 Calc. 268; 7 C. L. R. 6.

(3) (1918) 22 C. W. N. 937.

(4) (1919) L. R. 47 I. A. 76; I. L. R. 43 Mad. 567.

(5) (1906) 10 C. W. N. 932; 3 C. L. J. 54 n.

(6) (1879) I. L. R. 3 Bom. 159.

CIVIL.

1921.

Krishna  
v.  
Nagendrabala.

free to contest the reality or validity of the mortgage when he is attacked by the mortgagee : *Isakunnissas v. Pertab* (1) and other cases.

The Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do ; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and, thirdly, that she had independent and disinterested advice in the matter : *Mariam Bibee v. Ibrahim* (2).

On examination of judicial decisions on the point, they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence ; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted ; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test.

The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have possessed a capacity to judge for herself : *Hodges v. Delhi and London Bank* (3) and other cases.

These are only general principles, and it cannot be too strongly emphasized that there is a grave risk of failure of justice, if they are moulded into inflexible formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

An alteration in a document after its execution and registration made in good faith to carry out the original intention of the parties, does not vitiate the instrument : *Annada v. Annada* (4).

A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke : *Gour Chandra v. Prasanna* (5) and *Achhutanand v. Ram Nath* (6). Accordingly, any act which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technically an alteration. It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract ; it must also be in a material part of the instrument and must affect the rights and

(1) (1902) L. R. 26 I. A. 203 ; I. L. R. 31 All. 583 ; 10 C. L. J. 313.

(2) (1916) 28 C. L. J. 306 (367).

(3) (1900) L. R. 27 I. A. 168 ; I. L. R. 23 All. 137.

(4) (1916) 25 C. L. J. 155.

(5) (1906) I. L. R. 33 Calc. 812 ; 3 C. L. J. 363 ; 10 C. W. N. 783.

(6) (1913) 18 C. L. J. 354.

obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original.

What alteration is immaterial depends upon the nature of the instrument as also upon the nature of the change.

Though there may be ground for suspicion, though the conduct of the parties may engender doubt, the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony: *Mina Kumari v. Bijoy Singh* (1) and another case.

Appeal by the Defendant.

Suit on a mortgage bond.

The material facts appear from the judgment of Mookerjee J.

*Babus Surendra Madhab Mallik* and *Pramatha Nath Banerjee* for the Appellant.

*Dr. Sarat Chandra Basak* and *Babu Binode Lal Mookerjee* for the Respondent.

C. A. V.

The judgments of the Court were as follows:

**Mookerjee, J.**—This is an appeal by the seventh defendant in a suit on a mortgage bond executed by the first six defendants in favour of the plaintiff on the 13th February, 1915, to secure a loan of Rs. 12,000, which was made repayable on the 12th April, 1916, and was to carry interest at nine and a half per cent per annum with half-yearly rests. The right, title and interest of the mortgagors in the hypothecated property was sold in execution of a decree for money at the instance of one of their creditors and was purchased by the seventh defendant on the 20th June, 1916, in the name of his son-in-law, the eighth defendant, who executed a release in his favour on the 25th January, 1917. The mortgagee instituted the present suit on the 20th February, 1918, for realisation of the mortgage dues and joined as defendants the mortgagors as also the purchasers of the equity of redemption.

The mortgagors did not enter appearance, and the claim was resisted by the seventh defendant alone who urged that the bond had not been executed in conformity with section 59 of the Transfer of Property Act, and was not a *bona fide* document executed for consideration, but was in fact a colourable deed brought about with a view to defraud the unsecured creditors of the mortgagors. It was further alleged that the stipulation as to payment of interest and compound interest was an unconscionable bargain. On these pleadings, five issues were raised in the following terms:

(1) (1916) L. R. 44 I A. 72; I. L. R. 44 Calc. 662; 25 C. L. J. 508.

CIVIL.

1921

Krishna

v.

Nagendrabala.

June, 14,

CIVIL.

1921.

Krishna.

Nagendrabala.

Mookerjee, J.

1. Was the mortgage bond in suit duly executed and attested?
2. Was there any consideration for the bond in suit?
3. Is the plaintiff entitled to get compound interest as claimed?
4. Is the contract for payment of interest a hard and unconscionable bargain? Is the contract legally enforceable?
5. To what reliefs, if any, is the plaintiff entitled?

The Subordinate Judge has answered all the issues in favour of the plaintiff and has decreed the claim in full. On the present appeal, the decree of the Subordinate Judge has been challenged substantially on three grounds, namely, first, that the plaintiff has failed to prove that the consideration recited in the bond was paid either in whole or in part; secondly, that the plaintiff has failed to prove that the mortgage bond was operative against Saratkumari Debi, a purdanashin lady, who acted as guardian of her infant sons, the fourth and fifth defendants; and thirdly, that the bond was void by reason of material alteration after execution and attestation.

As regards the first point, there has been some discussion at the bar as to the *onus* of proof upon the question of payment of consideration, as the bond contains a recital that the money secured thereby had been received by the borrowers; there is, however, no room for controversy as to the true rule on the subject. If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the *onus* lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue. This is in accord with the decision of the Judicial Committee in *Kaleepershad v. Rajah Sahib Perhlad* (1); *Ali Khan v. Inderpersad* (2), and the decision of the Full Bench in *Fulli v. Bassiruddi* (3), where reference is made to *Chowdry Deby v. Chowdry Dowlut* (4). When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case. This position may be forfeited by reference to a long line of decisions, amongst others, to the cases of *Braje Jwäre v. Budhanuddi* (5);

(1) (1869) 12 M. L. A. 282.

(2) (1896) L. R. 23 I. A. 92; 1 L. R. 23 Calc. 950.

(3) (1869) 4 B. L. R. 54 F. B.; 12 W. R. 23 F. B.

(4) (1844) 3 M. L. A. 347; 6 W. R. P. C. 55.

(5) (1880) 1 L. R. 6 Calc. 268; 7 C. L. R. 6.



CIVIL.

1921.

Krishna  
v.  
Nagendrabala.  
Mookerjee, J.

*Shib Narain v. Shankar* (1) ; *Ghurphekni v. Purneshwar* (2) ; *Bisheshwar v. Harbans* (3) ; *Rahim Jan v. Iman Jan* (4) ; *Manohar v. Sumitra* (5) ; *Bablu v. Sita Ram* (6). The rule recognised in these cases is also supported by the analogy of the principle explained by the Judicial Committee in *Brij Lal v. Jnda Kunwar* (7), that recitals of legal necessity in mortgages or conveyances executed by Hindu widows are not of themselves evidence of such necessity, without substantiation by evidence *aliunde* as against reversioners who are strangers to the transaction : *Maheshwar Baksh v. Ratan* (8) ; *Deputy Commissioner of Kheri v. Khanjan* (9) ; *Khub Lal v. Ajodhya* (10).

In the case before us, the reality of the mortgage transaction is impugned by the purchaser of the equity of redemption and the burden of proof lies consequently in the first instance on the plaintiff to establish that the deed was duly executed and the consideration was paid. We may add, however, that the question of *onus* of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined ; but where evidence has been adduced by both the parties and the relevant facts are before

the Court, the question of burden of proof, as pointed out by Viscount Haldane in *Kundal Lal v. Begamunni* (11), and by Sir Lawrence Jenkins in *Seturatnam Aiyar v. Venkatachela* (12), becomes immaterial, and importance should not be attached to the question on whom the initial *onus* lay ; in such circumstances, the question of the burden of proof is really not pertinent. We shall now examine the evidence as to the execution and attestation of the mortgage deed and the payment of consideration.

The first three defendants, Khagendranath, Kumudindu and Mohanlal, along with their brother Makhanlal (who was the father of the fourth and fifth defendants and has since died) were members of a family of zemindars, the Mookerjees of Janai in the district of Hughli. The family had got involved in financial troubles, and on the 12th June, 1907, the four brothers executed a deed of trust in favour of the sixth defendant Rajanikanta Bhattacharyya

(1) (1900) 5 C. W. N. 403.

(2) (1907) 5 C. L. J. 653.

(3) (1907) 6 C. L. J. 659.

(4) (1911) 17 C. L. J. 173.

(5) (1895) I. L. R. 17 All. 428.

(6) (1914) I. L. R. 36 All. 478.

(7) (1913) I. L. R. 36 All. 187 ; 19 C. L. J. 469.

(8) (1896) L. R. 23 I. A. 57 ; I. L. R. 23 Calc. 766.

(9) (1907) L. R. 34 I. A. 164 ; I. L. R. 29 All. 331 ; 5 C. L. J. 344.

(10) (1915) I. L. R. 43 Calc. 574 ; 22 C. L. J. 345.

(11) (1918) 22 C. W. N. 937.

(12) (1919) L. R. 47 I. A. 76 ; I. L. R. 43 Mad. 567.

Civil.1921.KrishnaNagendrabala.Mookerjee, J.

(the father-in-law of Makhanlal) for the better management of their properties and for the payment of their debts. The embarrassment, however, was so grave that the plan to save the family estates proved fruitless, and towards the end of the year 1914, the Mookerjees were much harassed by execution proceedings instituted by at least two unsecured creditors who held decrees for money against them, namely, Phanindranath Mitra and the present plaintiff, Nagendrabala Chaudhurani. The pressure was indeed so persistent that it became necessary to raise a loan by mortgage of portion of the estate. But a difficulty was created by the circumstance that Makhanlal had died leaving a widow Saratkumari the daughter of the trustee defendant Rajanikanta and two infant sons. In 1910, after the death of her husband, Saratkumari had obtained a certificate of guardianship of the person and properties of her infant children. On the 3rd September, 1914, she obtained permission from the District Judge to raise a loan of Rs. 45,000 jointly with the uncles of the minors and the trustee, in order to pay off the debts due from the estate which, at the time, were alleged to amount to over a lac of rupees. This permission was revoked on the 2nd December, 1914, but liberty was reserved to renew the application when negotiations would be completed. On the 8th February, 1915, Saratkumari applied again for sanction to join her brothers-in-law and her father in raising a sum of Rs. 12,000, the loan to carry interest at nine and a half per cent per annum. It was stated that the money was required to pay the decretal debts due to Phanindranath Mitra and Nagendrabala Chaudhurani as also the accommodation loans which had been taken from time to time to avert threatened execution sales and to avoid a sale under Reg. VIII of 1819 of a valuable patni held by the family under the Moharaja of Burdwan. The security proposed to be offered to the creditor was the patni which had been previously mortgaged to one Haridas Banerjee on the 30th August, 1907. The District Judge heard the pleader Babu Girish Chandra Ghose who appeared in support of the petition and has been examined as a witness in this case. The application was allowed and the petitioner was directed to file within one month the proofs (that is, the statement of the debts and payments). This was carried out and the accounts were duly filed on the 8th March, 1915, showing that a sum of Rs. 12,000 had been raised on a mortgage to Nagendrabala Chaudhurani and had been applied in the discharge of numerous debts, large and small, which were due from the estate and were described in minute detail. These antecedent circumstances lend strong support to the genuineness of the transaction

which is set up by the plaintiff and is spoken to by her witnesses, Dharanidhar Ghose who was her officer from 1908 to 1916 and is an attesting witness to the mortgage bond deposes to the fact of execution and attestation and also proves the actual payment of the consideration. According to this witness, the execution and attestation took place in the house of Rajani Kanta where his daughter Saratkumari lived with her children. The document was then taken by Bhudar Chandra Dutt, the scribe (an officer of the plaintiff), to her house where the payment was to be made. The first defendant Khagendra Nath and the sixth defendant Rajani Kanta accompanied him and received the money in the presence of all the attesting witnesses. The story as narrated by this witness is corroborated by Murali Mohan Ray who was formerly an officer of the trust estate in the employ of Rajani Kanta. The actual payment was made by the witness Surendra Nath Bose who was at the time the manager of the estate of the mortgagee. The testimony of these witnesses is *prima facie* trustworthy and has been shaken in no way by cross-examination. But we have in addition the evidence of the plaintiff herself who has pledged her oath that the sum of Rs. 12000 was advanced from her own funds and under her direction by her manager Surendra Nath Bose. Against this mass of evidence, what have we on the other side? We have the testimony of Sashi Bhushan Mitra, an attesting witness, who asserts that at the request of the sixth defendant, he affixed his signature after the body of the document had been written out but before the executants had signed it. He adds that he did not see the passing of the consideration; obviously this does not cast doubt upon the case of the plaintiff, for the execution took place in the house of Rajani Kanta, while the payment was made in the house of the plaintiff. We have also the testimony of the seventh defendant, the appellant, before us. He has admittedly no personal knowledge of the mortgage transaction and naturally presses the Court to scan with suspicion every incident connected therewith. We must bear in mind, however, that, as stated by Sir Lawrence Jenkins in *Mina Kumari v. Bijay Singh* (1), and Lord Shaw in *Muhammad v. Bharat Indu* (2), recalling the dictum of Lord Westbury in *Sreeman v. Gopaul* (3), and of Lord Hobhouse in *Uman v. Gandharb* (4), though there may be ground for suspicion, though the conduct of the parties may engender

CIVIL.

1921.

Krishna

v.

Nogendrabala.

Moolerjee, J.

(1) (1916) L. R. 44 I. A. 72; I. L. R. 44 Calc. 562; 23 C. L. J. 508.

(2) (1918) 23 C. W. N. 321.

(3) (1866) 11 M. I. A. 28; 7 W. R. P. C. 10.

(4) (1887) L. R. 14 I. A. 127; I. L. R. 15 Calc. 20.

CIVIL.

1921.

Krishna

Nagendrabala.

Mookerjee, J.

doubt, the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony. Such as it is, the legal proof here is all on the plaintiff's side, while if indirect signs are sought, the suggestions thrown out by the defendant turn out to be of the most unsubstantial character, entirely unsupported by solid evidence. It has been insinuated against the plaintiff that she lent her name to enable the mortgagors to defraud their unsecured creditors. But no theory has been propounded, no motive has even been hinted at, to make this hypothesis credible. The evidence shows that the plaintiff is a wealthy *purdanashin* lady whose income from her personal estate is half a lac a year; she is the wife of a wealthy landowner whose income from his own properties is one lac a year. Mr. Mallik who has pressed the appeal with great zeal and earnestness could not suggest even a plausible reason why a *purdanashin* lady in the position of the plaintiff should consent to lend her name to a fictitious transaction of this character, with the inevitable result that she would be involved in a litigation and be examined as a witness. But if it seems unlikely that she could be prevailed upon to enter into such a transaction, it is no less improbable that her husband, who is shown by the evidence to have been present at the time of the payment, should have permitted his wife to get entangled in such a situation. But it is still more inexplicable that she should perjure herself in Court and conspire to divide the spoils after success in a nefarious litigation. On the other hand, the course followed by the appellant is not calculated to inspire confidence in his case. He purchased the equity of redemption at an execution sale after it has been proclaimed that Nagendrabala Chaudhurani claimed to have a mortgage on the property about to be sold. Indeed, it transpires that on the 16th February, 1916, the execution Court had recorded an order that as she had filed documents to substantiate her prayer under order 21, rule 62, Civil Procedure Code, her petition was to be read over by The Court officer to the intending purchasers at the time of sale. No doubt, as pointed out by the Judicial Committee in *Izzatunnessa v. Pertiab Singh* (1), if the mortgage notified turns out to be invalid, the benefit is taken by the purchaser, and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage; and the purchaser is free to contest the reality or validity of the mortgage when he is attacked by the mortgagee; *Shib v. Sheo* (2); *Jairaj v. Radha* (3); *Ganesh v. Purushotam* (4); *Narayan*

(1) (1909) L. R. 36 I. A. 203; I. L. R. 31 All. 583; 10 C. L. J. 313

(2) (1906) I. L. R. 28 All. 418.

(3) (1913) I. L. R. 35 All. 257.

(4) (1908) I. L. R. 33 Bom. 311.

*v. Umbar* (1). But the fact, nevertheless, remains that the appellant when he purchased the equity of redemption in the name of his son-in-law on the 20th June, 1916, was apprised of the alleged mortgage. We have the further fact that after he had purchased the equity of redemption for Rs. 24,000, the judgment-debtors applied to have the sale set aside under order 21, r. 90 Civil Procedure Code, on the ground that there were irregularities in the execution proceedings which had caused them substantial injury as the property had been sold at an inadequate price. In that proceeding, the Court held, on the objection of the appellant that the property was worth at least Rs. 60,000, and that as it had been sold subject to two mortgages namely, a first mortgage for Rs. 24,000 in favour of Sambhunath Kshetri and a second mortgage for Rs. 12,000 in favour of Nagendrabala Chaudhurani, it could not be deemed to have been sold at an inadequate price. This order was made on the 16th December, 1916, and the sale to the appellant was confirmed. We must take it, accordingly, that at the time of the purchase as also at the time of the confirmation of the sale, the appellant believed in the reality of the mortgage. The question naturally arises, when, how and from whom did he receive information which made him change his faith and adopt the conclusion that the mortgage was fictitious. He admits in his deposition that he had known the Mookerjees for twenty years; he had also known their trustee Rajanikanta for seven or eight years. There had also been a proposal to sell the disputed property to him five or six months before the auction sale. In such circumstances and in view of the fact that he is not altogether a stranger to law (he is an experienced solicitor of this Court) it might be expected that he would make enquiries and would also make a frank and full disclosure to the Court as to the information he had gathered in respect of the title to this property, both before and after his purchase. There is a singular absence of such materials from the record and the appellant cannot make a legitimate grievance if the Court holds that the positive evidence adduced on behalf of the plaintiff cannot be summarily swept away by vague allegations of a concerted scheme to defraud the creditors of the borrowers, when there is no trace in the evidence of such a design or of a plan for its execution. We feel no doubt whatever that the Subordinate Judge was right in his conclusion that the mortgage was a genuine transaction, that the deed was executed and attested and that the consideration was paid. We may add that as a last resort it has been faintly suggested

CIVIL.  
 1921.  
 Krishna  
 v.  
 Nagendrabala.  
 Mookerjee, J.

(1) (1911) 1 L. R. 35 Bom. 275.

CIVIL

1921

Krishna

Nagendrabala.

Mookerjee, J.

that the whole of the consideration was not paid. There is, however, no foundation for this contention, which is based on the endorsement on the bond made by the trustee on the 19th March, 1915 to the effect that Rs. 2000 had been paid on the 13th February, 1915, that is, on the day the bond was executed. There is some discrepancy in the evidence as to whether this sum of Rs. 2000 was repaid on that date or subsequently; but we see no reason to doubt that the payment was in fact made and the plaintiff has accordingly sued on the basis that the sum advanced was Rs. 10,000. As was pointed out in *Bajrangī v. Udit Narain* (1), the validity of a bond is not affected by the fact that the consideration recited was not paid in full; the bond is operative to the extent of the sum actually advanced. The first ground urged in support of the appeal cannot consequently be sustained.

As regards the second point, it has been urged that the mortgage should not be held operative in respect of the one-fourth share of the hypothecated property owned by the fourth and fifth defendants, inasmuch as there is no evidence to show that the deed was executed by their guardian Saratkumari Debi, a *purdanashin* lady, under circumstances which would make the transaction binding upon her. Stress has been laid on the absence of specific evidence to establish that the document was read over and explained to her and that she had independent advice. In support of this position, reliance has been placed upon the decisions in *Bindubashini v. Giridhari* (2); *Alikjan v. Rambaran* (3) and *Kali Bux v. Ramgopal* (4). In our opinion, there is no real force in this contention. The objection now put forward was not specifically set out in the written statement and is not covered by the issues. The evidence was consequently not directed to this point and the judgment of the Subordinate Judge does not indicate that this aspect of the matter was urged before him in the course of argument. Nor can we discover the faintest trace of the point in the numerous grounds embodied in the memorandum of appeal presented to this Court. Notwithstanding these circumstances, we have entertained the objection, inasmuch as the interest of infants represented by a *purdanashin* lady seemed to be involved; but for reasons presently to be stated, we have arrived at the conclusion that there is no substance whatever in the objection urged by the appellant. It is well-settled that the Court, when called upon to deal with a deed

(1) (1906) 10 C. W. N. 932; 3 C. L. J. 54n.

(2) (1909) 12 C. L. J. 115. (3) (1910) 12 C. L. J. 357.

(4) (1913) L. R. 41 I. A. 23; 1 L. R. 36 All. 81; 19 C. L. J. 172.

executed by a *purdanasheen* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgment of this Court in *Mariam Bibee v. Ibrahim* (1), and on examination they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the confusion which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions in *Ranee Usput Koorwar v. Tayler* (2); *Tayler v. Asmedh* (3); *Soondur Koomaree v. Kishoree Lal* (4); *Ram Pershad v. Ranee Phoolputtee* (5); *Kanai Lal v. Kamini* (6); *Roop Narain v. Gugadhur* (7); *Latchemy v. Lewcock* (8); *Chellummal v. Garrav* (9); *Narsunmall v. Lutchmana* (10). Reference may also be made in this connection to the two decisions of the Judicial Committee in *Busloor Ruheem v. Shumsoonissa* (11) and *Geresli v. Bhuggobutty* (12). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was

CIVIL  
1921.  
Krishna  
v.  
Nagendrabala.  
Mookerjee, J.

(1) (1916) 28 C. L. J. 306 (367).

(2) (1864) 2 W. R. 307.

(3) (1865) 4 W. R. 86.

(4) (1866) 5 W. R. 246.

(5) (1867) 7 W. R. 98.

(6) (1867) 1 B. L. R. 31 (O. C. J.) Foot note.

(7) (1868) 9 W. R. 297.

(8) (1800) 1 Strange N. C. 26 (30).

(9) (1812) 2 Strange N. C. 1.

(10) (1809) 1 Strange N. C. 312.

(11) (1867) 11 M. L. A. 551 (585); 8 W. R. P. C. 3.

(12) (1870) 13 M. L. A. 419 (431); 14 W. R. P. C. 7.

CIVIL

1921

Krishna

Nagendrabala.

Mookerjee, J.

properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from *purdah* women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist; *Fussul Ho sein v. Amjud Ali* (1); *Ashgar v. Delroos* (2); *Tacoordin v. Syed Ali* (3); *Sudisht Lal v. Sheobarat* (4); *Mahomed Bux v. Hoiseini* (5); *Lala Amarnath v. Achan Kuar* (6); *Annoda v. Bhudan* (7); *Shambati v. Jago* (8); *Ismail v. Hafiz* (9); *Sajjad v. Wasir* (10); *Kali Baksh v. Ramgopal* (11). It may also be observed that the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself; *Hodges v. Delhi & London Bank* (12); *Bindubashini v. Giridhari* (13); *Alikjan v. Ramharan* (14). These are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication. Tested in the light of these principles, how does the case before us stand? Saratkumari, though a *purdanashin* lady, was in no sense illiterate and was able to read the mortgage deed which had been written in her vernacular. The execution of the deed had been preceded by an application on her behalf to the District Judge who

(1) (1872) 17 W. R. 523. (2) (1877) I. L. R. 3 Calc. 324.

(3) (1874) L. R. 1 I. A. 192; 13 B. L. R. 427.

(4) (1881) L. R. 8 I. A. 39; I. L. R. 7 Calc. 245.

(5) (1888) L. R. 15 I. A. 81; I. L. R. 15 Calc. 684.

(6) (1892) L. R. 19 I. A. 196; I. L. R. 14 All. 420.

(7) (1901) L. R. 28 I. A. 71; I. L. R. 28 Calc. 546.

(8) (1902) L. R. 29 I. A. 127; I. L. R. 29 Calc. 749.

(9) (1906) L. R. 33 I. A. 86; I. L. R. 33 Calc. 773; 3 C. L. J. 484.

(10) (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613.

(11) (1913) I. L. R. 41 I. A. 23; I. L. R. 36 All. 81; 19 C. L. J. 172.

(12) (1900) L. R. 27 I. A. 168; I. L. R. 23 All. 137.

(13) (1909) 12 C. L. J. 115. (14) (1910) 12 C. L. J. 357.



had granted the requisite sanction. The terms of the deed were of the simplest character imaginable, and the covenant for the payment of interest was in no way unusual. She lived with her infant children in the family of her father and had the benefit of his advice; indeed, it was at his instance that the loan was raised with a view to discharge the family debts and to save the estate from sale in execution of decrees obtained by unsecured creditors. She was joined in the mortgage transaction by her three brothers-in-law who were the uncles and co-sharers of her infant children and were equally interested in the protection of the estate. The only persons whose advice she could have taken, either in the family in which she was born or in the family into which she had married, were her father and the brothers of her husband; they were present throughout the transaction and themselves joined as parties. It is also significant that neither she nor her father nor her brothers-in-law have entered appearance in this suit and contested the claim, though their personal liability under the mortgage instrument has not been extinguished by the lapse of time. In these circumstances, we are of opinion that the deed has been amply established to have been fairly taken from her, that she executed it as a free agent, and that she was duly informed of what she was about. Consequently, the deed cannot be successfully impeached and the second objection urged by the appellant must be overruled.

As regards the third point, it has been contended that the mortgage deed has become void and inoperative by reason of a material alteration made therein, without the assent of all parties concerned, after execution and attestation. It appears that the mortgage deed as written out did not contain a schedule of the details of the consideration money. There was a statement in the first clause to the following effect:

"We borrow this day from your fund the sum of Rs. 12,000 as per details given below and acknowledge receipt of the said money by this document." The details, however, could not be inserted then, because it had been arranged that the document would be executed and attested in the house of Rajani Kanta where his daughter Sarat Kumari lived, but the actual payment would be made in the house of the plaintiff. A blank space was accordingly left on the final sheet, and when the payment was made in the house of the plaintiff, the scribe made the following entry in the blank space:

CIVIL.  
1921.  
Krishna  
v.  
Nagendrabala.  
Mookerjee, J.

CIVIL.

1921.

Krishna,

Nagendrabala,

Mook-rjee, J.

|                                  |           |          |
|----------------------------------|-----------|----------|
| Schedule of consideration money. |           |          |
| P.B.                             |           |          |
| Currency Note No. 28620,         | one piece | Rs. 1000 |
| No. Do. 06918,                   | one piece | 1000     |
| Small notes, one thousand pieces |           | 10,000   |
| at Rs. 10 each                   |           | 12,000   |

Twelve thousand rupees only."

On these facts, it has been argued that there was a material alteration in the document which should have been re-executed by the borrowers and re-attested by the witnesses in order that it might be operative in law as a mortgage instrument. The Subordinate Judge has overruled this contention in the Court below on the authority of the decision in *Annada v. Ahlanda* (1), which shows that an alteration in a document after its execution and registration, made in good faith to carry out the original intention of the parties, does not vitiate the instrument. We are of opinion that there was in this case no material alteration in the deed when the schedule setting out the details of the consideration money mentioned in the body of the document was inserted in the blank space and that neither re-execution nor re-attestation was necessary to revive its vitality which had in no way been affected, much less suspended, by what had taken place. It was ruled by this Court in *Gour Chandra v. Prasanna Kumar* (2) and *Achutanand v. Ram Nath* (3), that a material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. Accordingly, any act which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change, or technically an alteration.

It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract, it must also be in a material part of the instrument and must affect the rights and obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original. Such is the

(1) (1916) 15 C. L. J. 155.

(2) (1906) I. L. R. 33 Calc. 812, 10 C. W. N. 783; 3 C. L. J. 363.

(3) (1913) 18 C. L. J. 354.

fundamental principle which lies at the root of the rule that a material alteration in an instrument invalidates it against all parties not consenting to the alteration. But it would be a fruitless task to endeavour to reconcile or even to compare the numerous conflicting decisions and often times fine-spun distinctions of which the alteration of promissory notes and other like instruments and the legal consequences flowing therefrom have been the prolific theme. Accordingly, the most advantageous course to follow is to test the facts of the litigation before the Court in the light of the fundamental principle just enunciated. Now, in the case before us, the first clause of the document recites that Rs. 12,000 was the consideration for the mortgage and acknowledges receipt of the sum by the borrowers. The bond would be operative even though the details of the consideration money were not set out; its validity depends not upon the detailed enumeration but upon the actual payment of the consideration money; and it is well-settled that either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed: *Hukimchand v. Hiralal* (1); *Vasudeva v. Narasamma* (2); *Kulmara v. Srinivasa* (3); *Adityam v. Rama Krishna* (4); *Lala Himmat v. Blewhellen* (5); *Gopal Singh v. Laloo Lall* (6); *Indrajit v. Lal Chind* (7). It has been urged, however, that though the alteration in the present case was not material in the sense that it varied the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varied the legal effect of the instrument as originally expressed [*Gardner v. W. Ish* (8)] it was still a material alteration, sufficient to invalidate the instrument, as it reduced to certainty a provision which was originally unascertained. This argument is manifestly fallacious. The provision that the consideration was Rs. 12,000 was not open to the objection of uncertainty and the schedule did not make that certain which was previously unascertained. What was made certain by the schedule was the mode of payment of the money, but that was not material for the validity of the deed: *Marckham v. Gona-ton* (9); *Eagleton v. Gutteridge* (10); *In re Barnard's Banking Corporation* (11),

(1) (1879) I. L. R. 3 Bom. 150.

(2) (1882) I. L. R. 5 Mad. 6.

(3) (1887) I. L. R. 11 Mad. 213.

(4) (1913) I. L. R. 33 Mad. 514.

(5) (1885) I. L. R. 11 Calc. 486.

(6) (1907) 10 C. L. J. 27.

(7) (1895) I. L. R. 18 All. 168.

(8) (1855) 5 E. &amp; B. 83 (89); 103 R. R. 377.

(9) (1598) Croke Eliz. 626 (627).

(10) (1843) 11 M &amp; W. 465 (469).

(11) (1867) L. R. 3 Ch. App. 105 (115).

CIVIL.

1921.

Krishna

v.

Nagendrabala.

Mookerjee, J.

CIVIL.  
1931.  
Krishna  
Nagendrabala  
Mookerjee, J.

The distinctions which have been recognised in some of the cases as to the materiality of words inserted in blanks in a deed are of a refined character and some of the decisions are not easy to reconcile. Thus in *Sellin v. Price* (1), the addition of a schedule of creditors to a composition deed, after execution and registration, was held to be a material alteration which vitiated the deed; but in *Wood v. Slack* (2), the addition to the schedule of the names of two creditors after execution and registration was held to be immaterial; see also *French v. Patton* (3); *Weeks v. Maillardet* (4); *Daines v. Heath* (5); *Dyer v. Green* (6); *Re Batten* (7). The substance of the matter is that the addition of anything perfectly immaterial does not affect the liability of the parties [*Catton v. Simpson*] (8), and where the alteration is an immaterial one, the Queen's Bench, declining to be bound by the second resolution in *Pigot's case* (9), decided in *Aldous v. Cornwell* (10), which was followed in *Crediton v. Exeter* (11), that the alteration does not vitiate the instrument, even though made by a party thereto. What alteration is immaterial must plainly depend upon the nature of the instrument as also upon the nature of the change; reference may be made in this connection to *Marckham v. Gomas-ton* (12), and *Paget v. Paget* (13) among earlier cases, and to *Adsett v. Hives* (14) and *Green v. Attenborough* (15) among modern decisions. We hold accordingly, for the reasons set out above, that the insertion of the schedule, setting out the details of the consideration mentioned in the body of the mortgage bond in this case, did not constitute a material alteration; it did not vary the meaning of the instrument or change the rights or interests, duties or obligations of the parties in any essential particular. The third contention of the appellant cannot thus be possibly supported.

The result follows that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

**Buckland, J.**—I agree and have nothing to add.

A. T. M.

*Appeal dismissed.*

(1) (1867) L. R. 2 Ex. 189.

(2) (1868) L. R. 3 Q. B. 379.

(3) (1808) 9 East 351; 9 R. R. 571.

(4) (1811) 14 East 568.

(5) (1847) 3 C. B. 938.

(6) (1847) 1 Ex. 71.

(7) (1889) 22 Q. B. D. 685.

(8) (1838) 8 A & E 136.

(9) (1614) 11 Coke Rep. 26b (27a).

(10) (1868) L. R. 3 Q. B. 573; 9 B. and S. 607.

(11) (1905) 2 Ch. 455.

(12) (1598) Moore 547; Crooke-Eliz. 626; 9 East 354 Note.

(13) (1687) 2 Rep. Ch. 410.

(14) (1863) 38 Beav. 52; 140 R. R. 14.

(15) (1864) 3 H. and C. 468; 140 R. R. 562.

## APPEAL FROM INSOLVENCY JURISDICTION.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

NATHMULL

v.

GONESHMULL JIVANMULL\*.

*Notice—Presidency Towns Insolvency Act 'III' of 1909), Secs. 13, '18—Omission  
to serve notice—Irregularity—Waiver—Burden of proof.*

Omission to serve the notice contemplated by sub-section 3 of section 13 of the Presidency Towns Insolvency Act is not a formal defect or irregularity within the meaning of section 118.

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him.

The burden lies upon the creditor to establish that the insolvent has waived the omission to serve the notice.

Appeal by the Insolvent.

Application by the insolvent to set aside an adjudication order under the Presidency Towns Insolvency Act. This application was rejected by Mr. Justice Greaves.

The material facts appear from the judgment.

*Messrs. N. Sarkar and K. P. Khaitan* for the Appellant.

*Messrs. A. N. Chaudhuri and B. L. Ghose* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This appeal is directed against an order of dismissal made on a petition to set aside an adjudication order under the Presidency Towns Insolvency Act. It appears that an application was made by a creditor of the alleged insolvent for an adjudication order. Notice of that application was served at 150 Cotton Street where it was asserted the appellant carried on business. The case for the appellant is that his residence was at 4 Banstollah and that there was in law, no service of notice; with the consequence that the adjudication order cannot stand. In this connection, our attention has been drawn to rule 75 of the rules under the Presidency Towns Insolvency Act. That rule contemplates a personal service on the alleged insolvent, and substituted service is permissible only if personal service cannot be effected. If personal service can-

\* Appeal from Insolvency Jurisdiction No. 98 of 1921, against the order of Mr. Justice Greaves, dated the 13th July, 1921.

Civil,  
1921.  
August, 8.

August, 8.

CIVIL.

1921.

Nathmull

v.

Goneshmull.

Mookerjee, J.

not be effected the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid such service or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business or by registered letter or in such other manner as the Court may direct, and such petition shall then be deemed to have been duly served on the debtor.

In the case before us, it is conceded on behalf of the respondent that the procedure prescribed in this rule was not followed. But it has been contended that the validity of the order for adjudication cannot be challenged on two grounds, namely, first, that the omission to serve the notice did not invalidate the adjudication order, because, it amounted to a formal defect or irregularity within the meaning of sub-section I of section 118 of the Presidency Towns Insolvency Act; and secondly, that the omission has been waived by the insolvent.

As regards the first ground we are not prepared to hold that the omission to serve the notice contemplated by sub-section 3 of section 13 of the Presidency Towns Insolvency Act is a formal defect or irregularity within the meaning of section 118. This notice is the first notice which the legislature contemplated was to be received by the alleged insolvent before the proceedings culminated in an adjudication order against him. It is of fundamental importance that an order of this description should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him. There is no authority directly in point, but our attention has been drawn to the case of *Ex parte Jerningham* (1), which was decided under another statute, but which indicates that a notice of this description at the initial stage should not be regarded as something the omission of which may be treated as a mere formal defect or irregularity. The cases of *Ex parte Kirkwood* (2), and *Ex parte Vanderlinden* (3), are clearly distinguishable. In the former case it was held a mere formal defect that the debtor was described in the petition as a cattle dealer and not cattle dealer and farmer. In the second case, it was held a formal defect that a petitioning creditor did not state in his petition his willingness to estimate his security though he gave notice thereof to the debtor

(1) (1878) 9 Ch. D. 466.

(2) (1879) 11 Ch. D. 724.

(3) (1882) 20 Ch. D. 289.

before the hearing. We are not prepared to hold that these cases have any analogy to the case before us. The decision in *In re Kissory Mohan Roy* (1), that an order for discovery under section 36 may be made *Ex parte* is clearly distinguishable, and does not support the contention that the adjudication order made in the present case without service of the initial notice prescribed by section 13 is a good order.

As regards the second ground, the burden lies upon the creditor to establish that the insolvent has waived this defect in the proceedings. Mr. Sarkar has maintained that there was no such waiver as the appearance before the Registrar at the subsequent stage was under protest, and we are not satisfied that there was in fact a waiver in this case.

We hold accordingly that this appeal must be allowed and the order dismissing the application to set aside the adjudication order reversed. The application will stand granted. But the consequence of this order will not be to dismiss the application of the petitioning creditor. The parties will be restored to the position which they occupied when the order for service was made under section 13, sub-section 3. The petition will stand revived and will be dealt with in accordance with law from that stage. The appellant is entitled to the costs of this appeal including reserved costs, if any.

*Mr. J. K. Sarkar*: Attorney for Appellant.

*Mr. T. B. Roy*: Attorney for Respondents.

A.T. M.

*Appeal allowed.*

(1) (1916) 20 C. W. N. 1155.

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

SUKHLAL KARNANI

-v-

THE OFFICIAL ASSIGNEE OF CALCUTTA.\*

*Discovery—Presidency Towns Insolvency Act (III of 1909), Sec. 39—Order, wilful disobedience of, effect of—Person ordered, duty of.*

\* Appeal from Original Order No. 89 of 1921, against the order of Mr. Justice Greaves, dated the 26th July, 1921.

CIVIL.

1921.

Nathmull

v.

Goneshmull.

*Mookerjee, J.*

CIVIL.

1921.

August, 11, 23.

CIVIL

921.

Sukhlal

The Official Assignee  
of Calcutta.

An order for discovery made under section 36 of the Presidency Towns Insolvency Act may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court. In view of such possibilities, the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were not in existence or were not under his control.

Appeal by the Petitioner.

An order was made by Mr. Justice Greaves directing the appellant to produce the *rokurs* and ledgers mentioned and service of order personally on the appellant as a peremptory order with the usual warning note.

*Messrs. N. Sarkar, S. K. Sen and Langford James* for the Appellant.

*Messrs. H. D. Bose and L. P. Pugh* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

August, 23.

**Mookerjee, J.**—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr Justice Greaves, directing the appellant to produce before the Registrar in Insolvency the *rokurs* and ledgers kept by him for the years 1974 and 1975 sambat.

The facts material for the determination of the question raised before us lie in a narrow compass and may be briefly recited. One Seldana was adjudicated an insolvent on the 2nd July, 1920. Seldana had carried on business in partnership with Sukhlal Karnani, the appellant before us, and the firm had transactions with the Munitions Board. On the 18th August, 1920, a complaint against Seldana was filed by the Munitions Board charging him with cheating, conspiracy to cheat and forgery. On the 26th August, 1920, a complaint was lodged against Karnani charging him with conspiracy to cheat. On the 29th November 1920, the Official Assignee made an application before the Registrar in Insolvency in the matter of the insolvency of Seldana. In that application, the Official Assignee alleged that Karnani could give information regarding the dealings and properties of the insolvent and prayed that Karnani should be summoned and examined by the Court and should be required to produce all books, papers, correspondence and accounts relative to transactions had between him and the insolvent in connection with their partnership and dealings with the Munitions Board from the 16th March, 1918. This application was granted *ex parte*. Karnani appeared before the Registrar in Insolvency on the 15th, 17th and 21st December, 1920, and was examined by



counsel, on behalf of the Official Assignee. The object of the examination was to ascertain whether or not Karnani was indebted to Seldana in a sum of Rs. 2,64,000. A petition was then presented by Karnani to Mr. Justice Greaves on the 4th January, 1921, with a view to obtain cancellation of the order for discovery made on the 29th November, 1920, under section 36 of the Presidency Towns Insolvency Act. The application was dismissed on the 7th January, 1921. An appeal was preferred against this order, on the ground, amongst others, that the order for discovery had been made *ex parte*. This contention was overruled on the authority of the decision in *In re Kissory Mohan* (1), and the appeal was dismissed by Sanderson, C. J. and Richardson, J. on the 17th March, 1921 (a). The judgment then delivered also stated that the Court was not satisfied that the examination was really intended to be used for an improper and ulterior purpose, namely, for the furtherance of the criminal prosecution. The matter was then taken up again by Mr. Justice Greaves and on the 28th June, 1921, he gave directions for the purpose of a fuller enquiry. An appeal was preferred against this order, and application was made to the Court of appeal to stay the enquiry pending the final disposal of the appeal. This application was refused on the 8th July, 1921, and the appeal failed (b). The result was that the order of the 29th November, 1920, stood as a good and valid order. Mr. Justice Greaves then held the further enquiry, and on the 26th July, 1921, made the order which is the subject matter of the present appeal. The order directs Karnani to produce the *rokurs* and ledgers mentioned and it is added that the order would be served upon Karnani personally as a peremptory order with the usual warning note.

In support of the appeal, it has been urged that the evidence does not conclusively show that the account books are in existence and are under the control of Karnani. That the account books were at one time in existence is clear from the statement of Karnani himself; it is true he did not write them and there is no evidence to show that he had them in his personal custody. The hypothesis which he started in the course of these proceedings was that during the raid of his premises by the police on the 23rd December, 1919, when numerous account books and papers were seized by the investigating officers, the particular account books now required might have been seized and taken away by the police. In view of

CIVIL.

1921.

Sukhlal

v.

The Official Assignee  
of Calcutta.

Mookerjee, J.

(1) (1916) 20 C. W. N. 1155.

(a) The judgment marked A will be found at the end of this report,—Rep.

(b) The judgment marked B will be found at the end of this Report—Rep.

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Mookerjee, J.

the order which we propose to make, it is not desirable that we should discuss in detail the evidence adduced in support of this allegation; it is sufficient to state that in our opinion the theory has not been established. An examination of the books and papers still in the custody of the police has shown that the books required are not there and were not amongst those taken away by the police at the time of the raid. This, however, does not by itself justify the inference that the only other possible alternative conclusion, to be deduced by an application of the principle of continuity, is that the books are still in existence and are under the control of Karnani. We cannot overlook the fact that during the whole of the time that this matter was under investigation, a criminal charge of a grave character was pending against Karnani, and that he apprehended, rightly or wrongly, that any statement he might make in connection with these proceedings, might be utilised by the prosecution, even if not actually used against him. Indeed, Mr Justice Greaves in the course of the judgment delivered by him on the 7th January, 1921, made the following observation which is pertinent in this connection: "Then, lastly, with regard to the alleged improper purpose of the examination, it seems to me that it is for the witness to object to such questions as he considers are put for an improper purpose, and if necessary, I think he would be justified on the advice of counsel in refusing to answer such questions even if directed to do so." We need not consider how far a refusal to answer questions might involve Karnani in serious trouble, if the principle recognised in *Exp. Fernandes* (1), should be invoked. But a perusal of his statement does leave one under the impression that this observation was not lost upon him and his counsel. The substance of the matter is that the enquiry has been conducted under circumstances which might very well prove seriously embarrassing to Karnani. Those circumstances, we have been informed, have, however, now changed as the criminal charge against him is no longer pending. Under altered conditions, he may thus be able to make fuller disclosures than what was considered practicable by his legal advisers during the pendency of the criminal proceedings; and we are of opinion that he should be afforded an opportunity to do so. An order for discovery made under section 36 may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court, as happened in the case of *Origaniti v. Desikachari* (2). In view of

(1) (1861) 10 C. B. N. S. 3; 123 R. R. 575.

(2) (1919) 36 M. L. J. 461.

such possibilities, the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were either not in existence or were not under his control.

The result is that this appeal is allowed and the order made by Mr. Justice Greaves on the 26th July, 1921 set aside. The case will be remitted, so that there may be a fresh investigation of the question, whether the appellant is in a position to carry out the order made on the 29th November, 1920, for the production of rokur and corresponding ledger of 1974 and 1975 sambat. The costs of this appeal will be in the discretion of the learned Judge who may rehear the matter.

*Messrs. Morgan & Co* : Attorneys for the Appellant.

*Babu Atul Chandra Ghose* : Attorney for the Respondent.

A. T. M.

*Appeal allowed.*

(A)

Appeal from Original Order No. 5 of 1921.

*Re. Albert Felix Seldana*

*Ex parte* : Rai Sukhlal Karnani Bahadur

*v.*

The Official Assignee of Calcutta.\*

**Sanderson, C. J.**—This is an appeal from the judgment of my learned brother Mr. Justice Greaves whereby he refused an application made on behalf of one Rai Sukhlal Karnani Bahadur in the Insolvency of one Albert Felix Seldana.

The application consisted of a prayer (1) for an order that the order of the 29th of November, 1920 should be set aside, (2) alternatively for an order that the proceedings thereunder should be set aside, (3) alternatively, for directions as to the scope of the enquiry before the Registrar.

The matter arose in this way ; Seldana was adjudicated an insolvent on the 2nd of July 1920 ; and on the 18th August, 1920, a complaint against Seldana was filed by the Munitions Board charging him with certain offences under certain sections of the Indian Penal Code which may be shortly described as cheating, conspiracy to cheat and forgery. On the 26th of August, 1920, a complaint was made against Sukhlal Karnani, the appellant in this appeal, charging

\* Appeal from Original Order No 5 of 1921, against the order of Mr. Justice Greaves, dated the 7th January, 1921.

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

*Mookerjee, J.*

*March, 17.*

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Sanderson, C. J.

him with conspiracy to cheat. The Official Assignee made an application before the Registrar in Insolvency, in respect of which an order was made on the 29th November, 1920. In that application after stating that Seldana had been adjudicated insolvent on the 2nd of July, 1920, the Official Assignee went on to allege that Sukhlal Karnani was capable of giving information regarding the dealings and properties of the abovenamed insolvent, and the Official Assignee applied that Karnani should be summoned and examined by the Court on a day and hour to be fixed therefor and to produce all books, papers, correspondence, accounts relative to transactions had between him and the insolvent in connection with their partnership and dealings with the Munitions Board from the 16th of March, 1918. That application was made *ex parte*, and the order of the 29th of November was to this effect, *vis.*, that "Sukhlal Karnani being served with a sealed copy of the order should on Wednesday the 8th of December at the hour of 11 o'clock in the forenoon attend before the Registrar to be examined regarding the dealings and the properties of the insolvent and that he should bring with him and produce at the time and place aforesaid all books, papers, correspondence and accounts relating to transactions had between him and the said insolvent in connection with their partnership and dealings with the Munitions Board from the 16th of March 1918." On the 16th and 17th of December, 1920 Karnani appeared before the Registrar in Insolvency and was examined by, learned counsel on behalf of the Official Assignee. It was alleged by the learned counsel appearing on behalf of the appellant that although the learned counsel nominally appeared for the Official Assignee he was really instructed by the insolvent Seldana, who was represented by the attorney who was appearing for the Official Assignee; and it was alleged that the real object of the examination of Karnani was to obtain information which might be useful to the prosecution instituted by the Munitions Board as Karnani was represented by learned counsel who took objections to certain questions, and it is settled that the Official Assignee had alleged that the object of the examination was *to ascertain whether or not Karnani was indebted to Seldana in a sum of Rs. 2,64,000*. A petition was then presented by Karnani to the learned Judge on the 4th of January, 1921, applying for the reliefs to which I have already referred.

The main ground of the argument in this appeal was that the further examination of Karnani ought to be stayed until after the

criminal prosecution has been finished ; for it was alleged that although the answers, which might be given by Karnani in his examination, might not be used against him, still it might be that those who were conducting the prosecution might obtain information from the answers, which might be useful in the criminal proceedings.

The learned Judge stated in his judgment those grounds on which the matter was argued before him : First it was said that under the Insolvency rules of this Court such an application must be verified by affidavit and that the verification was insufficient as it only related to the information and belief of the Official Assignee. Secondly, it was said that the application was insufficient in that it only referred to information regarding the dealings and properties of the insolvent, that it contained no reference to any indebtedness of Sukhlal Karnani to the insolvent and that being so the Insolvent had wrongly been questioned with regard to his indebtedness especially having regard to the terms of an agreement between the insolvent and Sukhlal Karnani dated the 22nd of August 1918 : and lastly, it was said that with regard to the Police Court proceedings pending against the insolvent and against Karnani the examination was being used for an improper purpose and amongst other things to displace clause 7 of the said agreement. The learned Judge declined to accept any of those arguments and said that there was ample material before him to show that Sukhlal Karnani was in a position to give some information with regard to the dealings and property. He made an order that the examination should proceed. Then he added as follows : " This being so, I think it is difficult to say that questions were incompetent with regard to any question of the indebtedness of Sukhlal to Seldana, if they arose in the course of the examination although I think that if it had been desired to establish this, the application should have so specifically stated but I am not prepared to interfere under the circumstances on the ground that such questions have been put. Then lastly with regard to the alleged improper purpose of the examination it seems to me that it is for the witness to object to such questions as he considers are put for an improper purpose and if necessary I think he would be justified on the advice of counsel in refusing to answer such questions even if directed to do. Under these circumstances it would be for the Registrar in Insolvency if he thought the refusal was ill-founded to report to the Court the refusal in order that the Court might consider the nature of the question and of the objection and I think that if this course is followed the witness will be amply protected with regard

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Sanderson C. J.

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Sanderson C. J.

to the putting of any question which may be improper and I only desire to add that I think the Official Assignee in future when he makes similar applications should place the Court in possession of further materials for considering if any application under section 36 is well founded or not."

The first two grounds which are referred to in the learned Judge's judgment were not seriously argued in this Court. But a new point was taken, namely that the order of the Registrar was made without jurisdiction or at any rate that it ought not to have been made *ex parte*.

The learned counsel who appeared for the Official Assignee assured us that it is the practice of the Court that such applications as this by the Official Assignee are always made *ex parte* before the Registrar; and that practice was not disputed by the learned counsel who appeared for the appellant. But the learned Counsel for the appellant urged that the practice was wrong and was not justified by the rules of this Court. Since the argument of this case the Officer of the Court has drawn my attention to a case, *in re Kissory Mohan Roy (Shaha) an insolvent* (1) in which the very point was decided by my learned brother Mr. Justice Greaves. Neither of the learned counsel drew our attention to it. It is a decision directly in point and authorizes the practice to which I have referred. The learned Judge based his judgment upon the grounds which were suggested, by my learned brother Mr. Justice Richardson during the course of the argument; and I assume that since this judgment which was in 1916 the practice has never been questioned until the hearing of this appeal. The application was made under section 36 (1) of the Presidency Towns insolvency Act, which runs as follows: "The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property."

There is nothing in the section which goes to show that notice of the application has to be served upon the person who, it is desired, should be examined. But it is said that the Insolvency rules of

this Court make it obligatory that notice of the application should be given: and, reliance was placed upon rules 17 and 18 of the Insolvency rules of 1914. Those rules are to be found in the portion of the rules which deals with "Motions and Practice" and there is another rule, No. 30 (which is under the heading "discovery of Debtors property") which is clearly applicable to an application under section 36 and it is as follows "Every application to the Court under section 36 of the Act shall be in writing and shall state shortly the grounds upon which the application is made."

CIVIL.  
1921.  
Sukhlal  
v.  
The Official Assignee  
of Calcutta.  
Sanderson, C. J.

It appeared to us in the course of the argument that the rule showed that it was not intended that the rules 17 and 18 should apply to an application under section 36 by the Official Assignee for an order that a person should be examined. I now refer to the case which was decided in 1916 by my learned brother Mr. Justice Greaves: The head note is "Applications under section 36 (1) of the Presidency Towns Insolvency Act for examination of persons thereunder are intended to be made *ex parte* under the rules framed by the Calcutta High Court under section 112 of the Act. To such applications rule 30 applies and not rules 17, 18 and 19, and this view is supported by the English Bankruptcy Act (1914), 4 and 5 George V, Ch. 59 and the rules thereunder." The portion of the learned Judge's judgment which I desire to read is this after referring to the section (36) and rules 17 and 18 he goes on to say, "If these rules govern applications under section 36 of the Act then the *ex parte* order was clearly wrong unless the Registrar thought that any delay would entail serious mischief. But I was referred to another rule by counsel who opposed the application, that is to say, to rule 30, which is as follows: (then he reads the rule). This rule to my mind clearly contemplates a procedure other than that laid down under rules 18 and 19 and it contains no provision for service of the application upon the person sought to be examined such as is contained in rule 19. Under these circumstances the inference to my mind is irresistible, that applications under section 36 are intended to be made *ex parte* and that this is the manner prescribed by the rules framed under section 112 of the Act."

Speaking for myself, I entirely agree with the learned Judge. I only regret that the learned counsel did not draw our attention to that case, which would have saved considerable argument and time of the Court.

Consequently the first point which was relied upon namely that

CIVIL.  
 1921.  
 Sakhlal  
 v.  
 The Official Assignee  
 of Calcutta.  
 Sanderson, C. J.

this order should not have been made *ex parte* is without any foundation.

The other ground namely that the examination has been used for an improper purpose in my judgment, equally fails. I am not satisfied that this examination was used for ulterior purpose. The learned counsel for the appellant did not draw our attention to any passages in the evidence or any questions which were put during the examination to justify this allegation. On the other hand the learned counsel for the Official Assignee draw our attention to some of the questions and some of the answers which were given by the witness and such answers led me to think that they were by no means satisfactory and that the attitude of witness was obstructive. Further this was a matter for the discretion of the learned Judge and I am not prepared to interfere with that discretion, specially having regard to the fact that the order which I have read, in my judgment has provided a safeguard which will protect the witness from improper questions being put to him during the course of his examination.

For these reasons in my judgment the appeal fails.

There is one other matter to which I must refer. The learned counsel for the Official Assignee took the point that the application before Mr. Justice Greaves was in fact an appeal from the order of the Registrar in Insolvency and if it were an appeal he argued that it was out of time.

In my judgment this was not an appeal; it was as I have already said a petition to set aside the order of the Registrar in Insolvency, and it then proceeded to ask in the alternative for a stay of the examination of the appellant or for directions as to the scope of the examination and, in my judgment in a case of this kind where an *ex parte* order is made for an examination of a witness by the Registrar in Insolvency, if there are any grounds justifying an application to the Court the proper course is to move the Court to set aside the order which has been made by the Registrar in Insolvency and that is what was done in this case. In my judgment it was not an appeal and consequently there is nothing in the point which the learned counsel for the Official Assignee raised with regard to the so-called appeal being out of time.

The learned counsel for the Official Assignee raised a further point that there was no appeal to this Court from the judgment of my learned brother Mr. Justice Greaves. Having regard to the fact that I have come to the conclusion that this appeal should be dismissed it is really not necessary to decide that point, but as at



present advised I am inclined to the opinion that the order of Mr. Justice Greaves was an appealable order, because it involves not only a decision that there should be no stay of the examination but also a refusal of the application of the appellant that the order of the 29th November, 1920 should be set aside.

For the foregoing reasons the appeal is dismissed with costs.

**Richardson, J.**—I agree. The preliminary question whether this appeal is competent involves two points. The first is whether the application to Mr. Justice Greaves to set aside the order made under section 36 to examine the appellant, was an appeal under clause (2) of section 8 or an application under clause (1). If it was an appeal it was out of time under section 101 and the appeal before us ought to be dismissed *in limine* on that ground. But I think it should be regarded, for reasons which have just been stated for the review of an *ex parte* order. The second point is whether the order of Mr. Justice Greaves from which this appeal has been taken, is a "judgment" within the meaning of clause 15 of the Letters Patent. I should be disposed to say, if it were necessary to decide this question, which it is not, that the order is a "judgment" because it assumes, if it does not decide, that the Registrar had jurisdiction to make the order and because, at any rate, it decides that on the merits the appellant had shown no cause sufficient to justify the order being set aside, that is to say, it rejects the claim made on the appellant's behalf that no order for his examination should ever have been made and that the whole proceeding should be quashed.

The next question relates to the jurisdiction of the Registrar. I agree that the Registrar had power under section 6 (d) and (c) to deal with an application made *ex parte* on behalf of the Official Assignee that the appellant should be examined under section 36, and further that under section 36 and rule 36 of the rules of the High Court the Registrar had also power to make the order for the appellant's examination *ex parte*, without notice to the appellant. On this part of the case I have nothing to add to what my Lord has said.

Lastly, on the merits, I can see no reason why we should disturb the order made by Mr. Justice Greaves. The appellant is entitled to the protection afforded by section 132 of the Evidence Act. Mr. Justice Greaves has been careful to couple his order with a safeguard against improper questions being put to the appellant. The appellant undoubtedly comes within the description of a

CIVIL.

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Sanderson, C. J.

CIVIL.  
 1921.  
 Sukhlal  
 v.  
 The Official Assignee  
 of Calcutta.  
 Richardson, J.

person capable of giving information regarding the insolvent, his dealings, or properties. In the interest of the general body of the creditors the Official Assignee is entitled to have him examined and I feel confident in my own mind that if the appellant is an honest man he will lose nothing by being frank. I hesitate to suggest any other hypothesis, but if any other hypothesis be suggested, I can see no reason why we should go further than Mr. Justice Greaves has already done to relieve the appellant from the situation in which he finds himself.

For these reasons I agree with my Lord that this appeal should be dismissed.

(B).

July 8.

**Sanderson, C. J.**—This is an application that an order made by my learned brother Mr. Justice Greaves dated the 28th June 1921 might be stayed pending the final disposal of the appeal filed by the petitioner against that order.

The order besides other matters included a direction that one Sukhlal Karnani should appear on Saturday the 9th of July at the hour of 11 o'clock in the forenoon before that Court to be cross-examined on behalf of the Official Assignee and that the Official Assignee should take steps to procure the attendance of one Dwarkadass for cross-examination on the statement made by him in his affidavit. This order was made in the Insolvency of one Albert Felix Seldana. It appears that some time in November an order was made by the Insolvency Court by which Sukhlal Karnani was ordered to attend on a day mentioned, in December, to be examined with regard to the dealings with the property of the insolvent, and to produce all books, papers, correspondence and accounts in connection with his partnership with the insolvent in dealings with the Munitions Board. There had been an appeal against that order and that appeal was dismissed, and there is no doubt that that order stands. Broadly speaking, the position is this; Sukhlal says that his premises were raided by the Police, that they took possession of all his books relating to the transactions between him and Seldana on the one hand and the Munitions Board on the other. The Police say that they went to his premises and asked for the production of his books and were given some by Sukhlal Karnani. It is moreover alleged by the Police that the books, which they got, do not relate to these transactions at all, and the case of the Official Assignee is that the books of Sukhlal Karnani, which were handed over to the Police, have no relation to the matters

which the Official Assignee desired to investigate in the Insolvency Court. The learned Judge says that the affidavits which have been put before him are not satisfactory; the books which are in the custody of the Police are in Nagri and he is not satisfied that a full and proper examination of those books was made by a person who understands Nagri, and finally, as I understand his judgment, the learned Judge has come to the conclusion that he was not able to say whether Sukhlal Karnani had carried out the order which was made in November last year; or to put it the other way he was not in a position to say whether Sukhlal Karnani was keeping back the books and documents relating to the matters in question and was not obeying the order which had been made by the Court against him. The learned Judge therefore decided to take the means available to him to satisfy himself upon this matter and he has directed that Sukhlal Karnani should be examined by the Official Assignee and that Dwarkadass, who was telling a story different to that set up by Sukhlal Karnani, should also be cross-examined. This is a matter which to my mind is within the discretion of the learned Judge and I am not disposed at the present stage to interfere with that discretion. The order of November last year stands as a good and valid order. The learned Judge in my judgment was entitled to take steps to satisfy himself upon the question whether Sukhlal Karnani had in fact carried out that order or not.

For these reasons in my judgment this application should be dismissed.

The Advocate General for the Official Assignee will get his costs out of the estate.

Richardson J.—I agree.

CIVIL

1921.

Sukhlal

The Official Assignee  
of Calcutta.

Sanderson C. J.

# APPELLATE CIVIL

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.  
Justice Richardson.

MAHARAJ BAHADUR SINGH

v.

SURESH CHANDRA ROY.\*

*Specific performance—Contract to lease—Suit brought within limitation period—  
Limitation Act (IX of 1908), Sch. I, Art. 113—Delay—Status quo—Material  
alteration in value of property.*

The proposition that delay, which is short of the period prescribed by the Limitation Act, which is of such a character as to give rise to an inference of abandonment of right and which is shown to have prejudiced the defendant, is a bar to a suit for specific performance: *Kissen v. Kally* (1), is doubtful.

Where the plaintiff's delay in filing a suit for specific performance of a contract to grant a putni lease to him, though three days before the time specified in article 113, schedule I, of the Limitation Act, has caused a material alteration in the value of the property because it led the tenants to hope that the lease would never be given and to agree to pay enhanced rent in order to prevent it from ever being given, the matter is not *status quo* at the time the suit was brought.

Appeal by the Plaintiff.

Suit for specific performance of a contract to grant to the plaintiff a *putni* lease.

The material facts appear from the judgment of the learned Chief Justice.

*Babus Joges Chunder Ray* and *Asita Ranjan Ghose* for the Appellant.

*Babus Mahendra Nath Ray* and *Manmatha Nath Ray* for the Respondent.

The Judgments of the Court were as follows :

**Sanderson, C. J.**—This is an appeal from the judgment of the learned District Judge of Dinajpore, by which he varied the decision of the first Court which had given the plaintiff a decree for

\* Appeal from Appellate Decree No. 1767 of 1919, against the decree of R. Garlick, Esq., District Judge of Dinajpur, dated the 24th May, 1919, reversing that of Babu Sasi Bhusan Banerjee, Officiating Additional Subordinate Judge of Dinajpur, dated the 9th July, 1917.

(1) (1905) I. L. R. 33 Calc. 633.\*

\* [See *Suryaprasadaraydu v. Lakshminarasimha* (1914) 26 M. L. J. 518, where *Nawab Begums v. A. H. Creet* (1905) I. L. R. 27 All. 678 was at p. 521 distinguished and doubted. See also *Peer Mahomed v. Ibrahim* (1904) I. L. R. 29 Bom. 234—Rep.]

specific performance. He set aside that decree and in lieu thereto directed that there should be a refund of Rs. 100, being the earnest money, with interest at 12 per cent. per annum and proportionate costs.

The suit was brought for specific performance of a contract whereby, it was alleged, the defendant agreed to grant to the plaintiff a *putni* lease of his share in an estate called Karaibari. The contract was to be carried out within a month of the date of the contract.

The material dates are these: The contract was dated the 16th of April, 1913. The month for completion would expire on the 16th of May 1913. The suit was brought on the 13th of May 1916. The time specified by article 113 of the Limitation Act expired on the 16th of May, 1916, so that the suit was brought 3 days within the period specified by the Limitation Act.

The first Court held that the plaintiff was entitled to a decree for specific performance. The learned Judge in the lower appellate Court, has, as I have already said, come to a contrary conclusion, and, the question is whether his decision should be upheld or set aside.

There has been considerable discussion upon the question whether mere delay is sufficient to justify the Court in refusing, in the exercise of its discretion, a decree for specific performance. On the one hand, reliance has been placed upon a decision of this Court given by my learned brother Mr. Justice Woodroffe in *Kissen Gopal Sadaney v. Kally Prosonno Sett* (1), the head note of which is "Delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of an abandonment of right is no bar to a suit for specific performance, unless it is shown to have prejudiced the defendant." A further case, *Kedar Nath Samanta v. Manu Bibi and others* (2), was relied upon. Those two cases illustrate the view which was relied upon by the learned vakil for the appellant. On the other hand the learned vakil for the respondent has argued that, even though the Act of Limitation has specified a period within which a suit for specific performance must be brought, it was still a matter for the discretion of the Court which tried the suit, whether a decree for specific performance would be given, and that when exercising that discretion the question of delay was a material matter for the Court to consider and the delay might of itself be sufficient to justify

CIVIL.

1921.

Maharaj Bahadur

Suresh.

Sanderson, C. J.

(1) (1905) I. L. R. 33 Calc. 633.

(2) (1911) 16 C. W. N. 247.

CIVIL.

1921.

Maharaj Bahadur

Suresh.

Sanderson, C. J.

the Court in refusing a decree. And, in support of that view he relied upon the case of *Nawab Begam and others v. A. H. Creel* (1), where, although the suit was brought within the time specified by the Act of Limitation, it was held that "Great delay on the part of the plaintiff in applying to the Court for specific performance of a contract, of which he claims the benefit, is of itself, sufficient reason for the Court in the exercise of its discretion to refuse relief." As an authority for that proposition in this Court reference was made to *Mokund Lall v. Chotay Lall* (2), where, although the suit was brought within the time specified by the Limitation Act, Mr. Justice Pigot said, "in this case, the time which was allowed to elapse was so long that under ordinary circumstance specific performance would not be granted by the Court." In that case the learned Judges did not decide the case on that ground in view of the fact that it had not been properly raised in the Court below. He said, "but it is impossible for us to say in the form in which this case comes before us in second appeal, that there may not have been circumstances in the present case that would justify the grant of a decree, even after the period which has elapsed."

Reference was also made by the learned vakil to the discussion in *Haradhan Deb Nath v. Bhagabati Dasi* (3), the passages referred to being at pages 861 and 862 where the learned Judges were discussing how much delay would be sufficient to prevent the plaintiff from getting a decree for specific performance, it being urged that if the law in this Court were as contended for by the appellant the discussion at pages 861 and 862 in that report would have been unnecessary.

I have referred to this point and to these cases, because the point has been argued before us, and in deference to the argument which has been presented to us. But I desire to make it clear that I express no decision on this occasion with regard to the two views which are illustrated by the cases to which I have referred; for, in my judgment it is not necessary for us to decide that point on this occasion, having regard to the findings of fact which appear in the judgment of the lower appellate Court and to which I will make reference presently. I give no decision upon this point, so that if the point arises on any future occasion I shall be at liberty to hear the arguments and express my judgment upon this matter without being fettered by any decision in this case.

(1) (1905) I. L. R. 27 All. 678.

(2) (1884) I. L. R. 10 Calc. 1061 (1070).

(3) (1914) I. L. R. 41 Calc. 852 (861, 862); 19 C. L. J. 429.

CIVIL.

1921.

Maharaj Bahadur

v.

Suresh.

Sanderson, C. J.

Now, even if the correct view of the law be that which was enunciated by my learned brother Mr. Justice Woodroffe in the case of *Kissen Gopal Sadaney v. Kally Proonna Sett* (1), in my judgment the learned Judge in the lower appellate Court has come to such findings in his judgment as would justify him in exercising his discretion and refusing a decree for specific performance to the plaintiff. Although he has not expressly found that the plaintiff's conduct amounted to an abandonment of the contract, in my judgment he has implicitly formed it. Further, in my judgment he has found that the matters at the time the suit was brought, were not *in statu quo* "they were at the time the contract was entered into." The findings to which I especially refer are at page 17. It appears that after this contract had been made the tenants of the defendant were particularly anxious that the contract between the plaintiff and the defendant should not be carried out. For some reason or other they had a strong feeling against the plaintiff or his predecessor and were anxious not to have him or her as their landlord or landlady. It appears further that some time after the contract was made the rents had been enhanced by arrangement between the defendant and the tenants. The learned Judge finds this, "If the plaintiff had filed her suit on the first refusal of the defendant to complete, there would probably have been no enhancement at all. When the tenants agreed to the enhancement they must have been under the impression that the plaintiff was not likely to sue to enforce the contract. I infer therefore that it was the plaintiff's delay in suing that caused this change in the value of the property." In my judgment that is a finding of fact that there was a change in the value of the property and that it had occurred by reason of the delay which was attributable to the plaintiff. The learned Judge goes on, "It is argued that the only reason for the delay was that the plaintiff was trying to get the dispute settled amicably. But the pleader Nalini Babu, whose intervention was sought, spoke to the defendant quite two years before the institution of the suit and got a definite answer that the defendant would not complete the contract. The delay for two years after that is unexplained." The first Court had found that the delay was explained by the plaintiff trying to get an amicable settlement, but the learned Judge in the lower appellate Court overruled that finding. We are bound to take the finding of the lower appellate Court on a question of fact such as this. The learned Judge came to a definite finding that the delay for two years

(1) (1905) L. L. R. 33 Calc. 633.

CIVIL.

1931.

Maharaj Bahadur

v.

Suresh.

Sanderson, C. S.

Ses.

after the defendant's definite refusal to carry out the contract was entirely unexplained.

The matter does not stop there: The Learned Judge then went on, "I am not satisfied that the plaintiff was originally at all anxious to complete the contract. The price offered by Rajendra Babu for the property was extremely high, and was very possibly much more than the plaintiff was prepared to give." "It seems to me that the price agreed on was nearly double the value of the property at the time of contract, and that the plaintiff would never have attempted to enforce the contract but for the subsequent enhancement of the rent. It is this enhancement which has occasioned not only the defendant's refusal, but also the plaintiff's anxiety to complete. The alleged early efforts to complete are proved only by plaintiff's own officer Beni Babu, who is contradicted by Nrisingha Babu, a more reliable witness."

There is a further finding that "the plaintiff's delay in filing the suit has caused a material alteration in the value of the property because it led the tenants to hope that the lease would never be given and to agree to pay enhanced rent in order to prevent it from ever being given." As I have said, those findings, in my judgment, really amount to a finding that the plaintiff at one time abandoned the contract, and that the value of the property had considerably increased between the date of the contract and the time at which the suit was brought. Consequently, the matters were not, according to the finding of the learned Judge in *statu quo* at the time the suit was brought.

Under these circumstances the question is whether, having regard to the terms of section 22 of the Specific Relief Act, the learned Judge has exercised his discretion in an arbitrary way or whether he has exercised it in a sound and reasonable way guided by judicial principles and capable of correction by a Court of appeal. In my judgment, he has not exercised his discretion in an arbitrary way but he has done so in a sound and reasonable way guided by judicial principles, and he has stated sufficient in his judgment to enable us, sitting as a Court of appeal, to judge of the principle which guided him.

For these reasons in my judgement this appeal should be dismissed with costs.

**Richardson, J.** :—I concur and for the reasons which the learned Chief Justice has just stated.

A. T. M.

*Appeal dismissed.*



Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr.  
Justice Suhrawardy.

CHANDRA NATH SORMA MOTAYED

v.

SHEIKH INAMDI\*.

CIVIL.

1921.

March, 19.

*Agricultural lease—Lease, expiry of, before the passing of Bengal Tenancy Act (VIII of 1885)—Holding over—Bengal Tenancy Act, Sec. 67—Rate of interest—Exorbitant rate.*

Where an agricultural lease expired before the passing of the Bengal Tenancy Act, a tenant who holds over, is not liable to pay interest on the arrears of rent more than that mentioned in section 67 of the Act: *Administrator-General of Bengal v. Asraf Ali* (1), followed. *Kishore Lal Dey v. The Administrator-General of Bengal* (2) dissented from.

Where the rate of interest on arrears of rent as stated in the Kabuliats executed by a cultivating raiyat in favour of his landlord was 150 per cent per annum :

*Held*, that the rate was exorbitant : *Kuli v. Trailokha* (3) followed.

Appeal by the Plaintiff.

Suit for arrears of rent.

The material facts appear from the judgment.

*Babu Prafulla Chandra Chakravarty* for the Appellant.

*Babu Birendra Kumar De* for the Respondent.

The judgment of the Court was delivered by

**N. R. Chatterjea, J.** :—This appeal arises out of a suit for arrears of rent. The plaintiff claimed interest on the arrears of rent at the rate of 150 per cent. per annum. The Courts below disallowed the high rate of interest on the ground that it was exorbitant and awarded damages at 25 per cent. The land was held under a lease for a term of 3 years from Magh 1285 to Pous 1288. The lease expired before the passing of the Bengal Tenancy Act; there was no fresh lease and the tenant was holding over.

There is divergence of judicial opinion upon the question as to the effect of holding over. In the case of *Kishore Lal Dey v. The Administrator General of Bengal* (2), Ghose and Wilkins JJ. were

March, 19.

\*Appeal from Appellate Decree No. 2162 of 1919, against the decree of Babu Atul Chandra Banerjee, Officiating Subordinate Judge, 3rd Court, of Mymensingh, dated the 25th June, 1919, affirming that of Babu Keshab Chandra Sen, Officiating Additional Munsiff at Iswargunge, dated the 16th January, 1919.

(1) (1900) I. L. R. 28 Calc. 227. (2) (1898) 2 C. W. N. 303.

(3) (1899) I. L. R. 26 Calc. 315.

CIVIL.

1921.

Chandra Nath

v.

Inamdi.

N. R. Chatterjee, J.

of opinion that when a tenant holds over, after the expiration of his lease, he does so on the terms of the lease, on the same rent and on the same stipulation as are mentioned in the lease until the parties come to a fresh settlement; that there is no general rule of law to the effect that the lease of an agricultural tenant in this country who holds over, must be taken as renewed from year to year, and that if any contract is to be implied, it should be taken to have been entered into so soon as the term of the lease expired rather than at the beginning of each year. In that case the suit was brought on the basis of a kabuliati which was for a term of 5 years, the interest stipulated to be paid was 75 per cent, and the lease expired before the passing of the Bengal Tenancy Act. The learned Judges held that the tenant was bound to pay interest at the rate stipulated in the kabuliati, and that the tenancy was unaffected by the provisions of the Bengal Tenancy Act. On the other hand, in the case of *Administrator General of Bengal v. Asraf Ali* (1), a contrary view was taken. There also, the land was held by an agricultural tenant under a lease for a term of 6 years which expired in 1881; the tenant had been holding over ever since, and the rate of interest specified in the lease was 75 per cent. per annum. The landlord sued for rent for the years 1893 to 1895 and part of 1896 with interest at the rate specified in the lease. It was held that under the provisions of the Bengal Tenancy Act, the plaintiff could not recover interest at a rate higher than 12 per cent. per annum and that when an agricultural tenant holds over, his tenancy is renewed from year to year.

Ameer Ali and Brett JJ. in deciding the case referred to a number of cases including the case of *Kishore Lal Dey v. Administrator-General of Bengal* (2), and also to *Ali Mamud Pramanick v. Bhagubati Debya Chowdhurani* (3), where it was held by Rampini and Henderson JJ. that where a tenant was holding over on the expiration of a lease which had been executed before the passing of the Tenancy Act, but which expired after it came into force, the landlord was not entitled to interest beyond that provided by section 67 of the Act. Ameer Ali and Brett JJ. observed that a distinction had been drawn between the latter case and that of *Kishore Lal Dey* (2) on the ground that the lease had expired after the Tenancy Act came into operation, but that fact did not appear to them to affect the general principle. Then the learned Judges referring to the decision in the case of *Kishore Lal* (2), that a tenant

(1) (1900) I. L. R. 28 Calc. 227. (2) (1898) 2 C. W. N. 303.

(3) (1898) 2 C. W. N. 525.

holds over with the consent of the landlord does so, upon the same conditions as those set out in his time-expired lease, and that if any contract is to be implied, was contended for on behalf of the appellants, it should be taken to have been entered into so soon as the term of the lease expired rather than at the beginning of each year, observed. "If this means that the implied contract is for the same term of years as in the lease (of course it could not be for an indefinite period) we venture to think the correctness of the dictum is open to question. We consider that when an agricultural tenant holds over his tenancy is from year to year." There appears to be therefore some conflict between *these two* cases.

In other cases which have been urged before us, the question was whether the purchaser of a rayati holding at a sale held for arrears of rent is liable to pay interest stipulated in the kabuliat, and it was held that the purchaser was not bound on the ground that a very high rate of interest is not an ordinary incident of such a tenancy and that there was a new contract with the purchaser at the sale. For instance see *Alim v. Satis Chandra Chaturdhuri* (1) and *Kali Nath Sen v. Trilokhya Nath Roy* (2). In those cases however the lease had expired, the tenant was holding over and the sale took place after the passing of the Bengal Tenancy Act. In *Lal Gopal Dutt Chowdhry v. Manmatha Lal Dutt Chowdhry* (3), the Full Bench held that the purchaser at a sale in execution of a rent decree was bound by the stipulation as to interest in the kabuliat as it was a subsisting lease. There is no doubt that where there is a subsisting lease granted before the passing of the Bengal Tenancy Act, the tenant will be bound, as in the case of a permanent tenancy, by the stipulation as to the interest payable.

The question, however, is whether in a case where the lease had expired before the passing of the Tenancy Act and where the tenant had been holding over, he is liable to pay interest as stipulated in the kabuliat, however, high the rate may be. As stated above, there is some difference of judicial opinions on the point. We think, under the circumstances, we should follow the decision of Ameer Ali and Brett JJ. in *Administrator-General of Bengal v. Asraf Ali* (4), that being the latest decision on the point. There it was pointed out by the learned Judges "Supposing the contract was expressly renewed after the passing of the Act and the stipulation as to interest was embodied in a new lease, the tenant would not be bound by it and the stipulation would not be enforceable

Civil.  
1921.  
Chandra Nath  
v.  
Inamdi.

N. R. Chatterjea, J.

(1) (1896) I. L. R. 24 Calc. 37.

(2) (1899) I. L. R. 26 Calc. 315.

(3) (1904) I. L. R. 32 Calc. 258.

(4) (1900) I. L. R. 28 Calc. 227.

CIVIL.

1921.

Chandra Nath

v.

Inamdi.

N. R. Chatterjee, J.

under the law. It would be anomalous to hold that what cannot be done by a lease may be done by allowing the tenant simply to hold over." It was further observed "It is unnecessary to decide in this case whether the contract implied from the holding over is from year to year or not for assuming it should be taken to have been entered into so soon as the term of the lease expired rather than at the beginning of each year" and that this contract is for the same term as in the lease, even then, in our opinion the present claim for interest beyond that allowed by section 67 would not be maintainable. For the term of 6 years under the "implied contract" would end in 1886 whilst the Tenancy Act came into force in March 1885. The fresh contract implied by the fresh holding over according to the learned Judges in the case of *Kishor Lal Dey* (1) would begin from 1886 when the Tenancy Act was in operation and must necessarily be subject to and governed by the provisions and restrictions of the Tenancy Act." If the effect of holding over is that the tenant holds for the same term of years as in the original lease, the second renewal of the contract implied by the second holding over, in the present case, took place after the passing of the Bengal Tenancy Act. The observations made in the case of *Administrator-General of Bengal v Asraf Ali* (2), will, therefore, apply to the facts of the present case.

The rate of interest as stated above is 150 per cent. There is no doubt that it is an exorbitant rate. In the case of *Kali Nath Sen v. Trailokhya Nath Roy* (3). Banerjee J. referring to a similar contract where the rate of interest was 225 per cent per annum, observed that the contract was entered into between the landlord and a cultivating raiyat, that is, a person belonging to a section of the community that has been considered entitled to some special protection not only by the legislature as is evident from the provisions of the Bengal Tenancy Act, section 67 and section 178, sub-section (3) clause (h), but also by Courts of justice as will be seen from the observations of Mr. Justice Mahmood in the case of *Lalli v Ram Prasad* (4).

We are of opinion that the decision of the Court below is right and this appeal is dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1900) I. L. R. 28 Calc. 227.

(2) (1898) 2 C. W. N. 303.

(3) (1899) I. L. R. 26 Calc. 315.

(4) (1886) I. L. R. 9 All. 74.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

SAROJINI DASI

v.

HARIDAS GHOSH.\*

Civil.

1931.

January, 20, 21.  
April, 14.

*Will—Preparation—Suspicious circumstances—Suspicion—Acquittal—Conclusive—Evidence—Improbability—Will, construction of, rule for—Hand-writing, proof of—Evidence Act (I of 1872), sections 47, 73—Comparison of hand-writings.—Signatures.*

Wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed: *Tyrrell v. Panton* (1). But this suspicion must be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction: *Jarat Kumari v. Bissessur* (2).

Where there has been acquittal, the acquittal is conclusive: *Emperor v. Noni* (3).

In order to prevail against such evidence as has been adduced, the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute, an impossibility: *Chotey Narain v. Ratan Koer* (4). The objection that the witnesses might have been of a better class is at an end when execution and attestation are proved: *Jograni v. Durga Farsad* (5).

In the case of a will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety.

The ordinary methods of proving hand-writings are (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the hand-writing by virtue of section 47 of the Evidence Act; (ii) by a comparison of hand-writing as provided in section 73 of the Evidence Act; and (iii) by the admission of the person against whom the document is tendered.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

The provision of section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed; and next the writing to be compared with the standard or, in other words, the

\* Appeal from Original Decree No. 279 of 1919, against the decree of G. N. Ray Esq., District Judge of Hughli, dated the 10th September, 1919.

(1) (1894) P. 151 (159). (2) (1911) I. L. R. 39 Cal. 245.

(3) (1911) 15 C. W. N. 593; I. L. R. 38 Cal. 557.

(4) (1894) L. R. 22 I. A. 12; I. L. R. 22 Cal. 519.

(5) (1913) L. R. 41 I. A. 76; I. L. R. 36 All. 93; 19 C. L. 165.

CIVIL.

1921.

Sarojini Dasi

v.  
Haridas.

disputed writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person. The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.

A comparison of hand-writing is at all times as a mode of proof, hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.

A comparison of hand-writing is a mode of ascertaining the truth which ought to be used with very great caution; *Robin v. Rassick* (1) and other cases.

Although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine.

• If two signatures are exactly identical, there is reason for suspicion that the one in question may be a copy or careful imitation of the genuine signature.

The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent, but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a facsimile that one is a perfect match to the other in every respect.

It is not difficult to forge the hand-writing of almost any person so that it may be impossible for even the most acute and experienced judge to discriminate between the false and the true.

Appeal by the Applicant.

Application for letters of administration with a copy of the will annexed.

The material facts appear from the judgment of Mookerjee, J.

*Babus Ram Chandra Mosumdar, Manmatha Nath Mukherjee, Satindra Nath Mukherjee and Rama Prosad Mookerjee* for the Appellant.

*Dr. Dwarka Nath Mitter and Babu Debendra Nath Mandal* for the Respondent.

C. A. V.

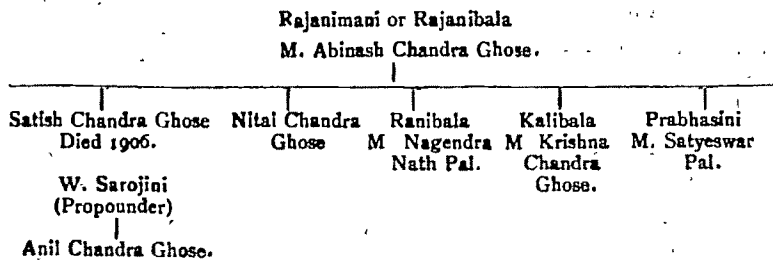
The judgments of the Court were as follows :

**Mookerjee, J.**—The subject-matter of the litigation which has resulted in this appeal is the estate left by one Rajanimani alias Rajanibala Dasi, a Hindu lady who died on the 21st March, 1917. She left a son Nitai, a grandson Anil by a predeceased son, and

(1) (1884) 1, L. R. 10 Calc. 1047 (1051).

April, 14.

three married daughters. The relationship of the several members of the family is indicated on the following genealogical table :



CIVIL.  
1921.  
Sarojini Dasi  
v.  
Haridas.  
Mookerjee, J.

The case for the appellant is that three days before her death, Rajanimani made a testamentary disposition of her properties. On the 25th August, 1917, an application for probate was lodged in the Court of the District Delegate by the present appellant Sarojini, the widowed daughter-in-law of the deceased, but it was returned as objection was filed. An application for letters of administration with a copy of the will annexed was consequently presented to the District Judge on the 12th October, 1917. Objection was thereupon lodged on the 22nd January, 1918, by the respondent Haridas Ghose on the allegation that he had, on the 28th May, 1917, acquired title to the estate left by Rajanimani, by purchase from her son Nital Chandra Ghose who had succeeded thereto as the heir-at-law. Thus emerged the question in controversy between the parties, namely, whether the will alleged to have been executed by Rajanimani on the 18th March, 1917, is or is not genuine. The District Judge has come to the conclusion that the will propounded was not duly executed. On the present appeal the correctness of this view has been impeached on behalf of the propounder.

The preamble to the will recites that the testatrix had been in failing health for some time and had come to the residence of his second son-in-law Krishna Chandra Ghose at Baranagore in the northern suburbs of Calcutta. The first clause enumerates the relations of the testatrix as set out in the genealogical table. The second clause states that her surviving son Nital Chandra Ghose had taken to evil ways and that she had consequently decided not to leave him any portion of her estate ; but that if he left any son or sons of good character, the said grandson or grandsons would, after attainment of majority, be competent to possess and enjoy the property according to the terms of the will. The third clause gives a description of her properties, namely, two houses in Calcutta, one purchased with her own money, the other obtained by virtue of a deed of gift from her mother-in-law. The fourth clause provides

CIVIL.

1911.

Sarojini Dasi

v.

Haridas.

Mookerjee, J.

for maintenance allowance to an aunt-in-law dependent upon her. The fifth clause gives a monthly allowance to her son Nitai, her grandson Anil and to her three married daughters. The sixth clause provides for the performance of her Sradh from the sale proceeds of her ornaments, the surplus to be taken by her son Nitai. The seventh clause gives one-half of her property to her grandson Anil and the other half to the son or sons that might be born of the loins of her son Nitai. The eighth paragraph makes the various sums payable as maintenance, a charge on the estate. The ninth clause contains miscellaneous directions. There can be little doubt that the primary object of the testatrix was to keep her property out of the hands of her son who had taken to drink and women at an early age, and had in 1912 become involved in a shooting case.

There are six attesting witnesses to the will including the scribe. All of them have been examined. The evidence of Babu Jyotish Chandra Hazra, a vakil of this Court who is related to the family and was consulted by the lady as to a possible testamentary disposition, has also been recorded. The District Judge has stated that he believed in full the evidence of Babu Jyotish Chandra Harza. That evidence shows that the lady sent for him and requested him to draft a will, so that Nitai might not be able to destroy the estate. She said that she had two houses in Calcutta and that she wished to leave one half to the son of his predeceased son and the other half to the son of Nitai, if one should be born. She also desired to provide small monthly annuities for her aunt and her married daughters. Jyotish Babu thereupon told the lady that such a will, leaving something to an unborn person, was not possible, but that as the law might soon be altered by a Bill already introduced into the Council, she could make the will she desired after the law had been changed. This Bill as we know was passed on the 28th September, 1916, and was placed on the statute book as Act XV of 1916. Jyotish Babu further stated that he met Krishna Chandra Ghose, the son-in-law of the lady, after the law had been altered, and told him to inform her that she could then make the will she wanted. Sometime afterwards, Krishna Chandra came to the house of Jyotish Babu at Bhowanipur, told him that the lady was very ill at Baranagore and requested him to draft a will. Jyotish Babu told Krishna Chandra that he was occupied with examination work and could not afford time to see the lady for the next ten or fifteen days. Upon this evidence, strengthened by that of Dr. Gokul Chandra Dhar, there is no room for doubt that before September, 1916, the



lady had intended to make a testamentary disposition of her properties, so as to exclude her son from the inheritance, and that she retained such intention as late as the end of February or the beginning of March, 1917, after she had removed from her residence in British Chandranagore, to the house of her second son-in-law at Baranagore. The question has accordingly to be faced, whether she did in fact carry out her intention by means of the document under consideration. Her son-in-law Krishna Chandra Ghose who holds an important position in a mercantile firm and who takes no benefit under the will, unless, indeed, the annuity of Rs. 2 a month in favour of his wife can be regarded as such, has been examined and cross-examined at considerable length. He corroborates the narrative of Babu Jyotish Chandra Hazra in every material particular, and adds that his mother-in-law had repeatedly expressed a wish to make a will in view of the conduct and character of her son Nitai. On the refusal of Jyotish Babu, he went to Narayan Chandra Chatterjee, a pleader of Baranagore, now dead, who expressed his inability to come on the Sunday, on which the will was made. Thereupon, a neighbour Adhar Chandra Ghose, a trader in rice, offered to secure the services of a deed-writer, Nanda Lal Das, who was known to him. Krishna Chandra accordingly took Nanda Lal to his mother-in-law who gave him instructions about the provisions to be inserted in the will. Nanda Lal thereupon prepared a draft, which has been produced in these proceedings. It was read over to Rajanimani, and after she had expressed her approval, Nanda Lal made a fair copy. At this juncture, Rasbihari Mookerjee, the physician who attended upon Rajanimani, came to see her, and as was quite natural, he was requested to stay and attest the will. Krishna Chandra also asked a neighbour Saileswar Sanyal, a trader, to come and attest the will. It so happened that Jitendra Nath Upadhyay, a pleader of the Alipore Bar, had just at that time come to Saileswar Sanyal to collect some money due to his brother. Krishna Chandra, seeing him present, and learning that he was a pleader, pressed him to come and be an attesting witness. The will was subsequently executed by the lady, and was attested by Nanda Lal Das, the scribe, Krishna Chandra Ghose, the son-in-law of the testatrix, Adhar Chandra Ghose, a local trader, Rashbihari Mookerjee, the physician, Saileswar Sanyal, a neighbour and a trader, and Jitendra Nath Upadhyay, the pleader. These persons have come forward to pledge their oath that the will was executed by the lady and was duly attested by them. They are persons of respectability, and no hypothesis has been put

CIVIL.

1921.

Sarojini Dasi

v  
Haridas.

Mookerjee, J.

CIVIL,

1921.

Sarojini Dasi

v.

Haridas.

Mookerjee, J.

forward, except the innate perversity of human nature, to explain why they should all conspire to forge the will, and to perjure themselves in Court. The version given by them in examination-in-chief has not been affected by cross-examination; on the other hand, their statements are free from material contradictions, and their narratives have the ring of truth about them. These statements are further supported by Sarojini, the widowed daughter-in-law of the testatrix who was in the room where the document was executed; she was subjected to a severe and prolonged cross-examination, but with no effect. This mass of testimony has, however, been summarily brushed aside by the District Judge, on grounds of suspicion for which no foundation has been laid in the evidence. No doubt, as stated by Lord Davey in *Tyrrell v. Painton* (1), wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But as was explained by Jenkins, C.J. in *Jarat Kumari v. Bissessur Dutt* (2), this suspicion must be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. The reasons assigned by the District Judge for his refusal to act upon the testimony of some at any rate of the witnesses examined in this case indicate, however, that he has approached the evidence from an entirely erroneous standpoint. Thus, with regard to Nanda Lal Das the scribe, he notes that he was procured from Serampore across the river and adds that as he has been a pleader's clerk and writes for people frequenting Courts and Registration offices, he is a likely hand to be chosen for 'getting up a deed'. There is no foundation laid in the evidence for the imputation thus made against professional deed-writers in general. He next dismisses the evidence of the doctor Rasbihari Mookerjee with the remark that he does not pay income tax and was prosecuted in a forgery case. This comment is based apparently on a statement made by the witness in the following terms: "there was a criminal case against me for forging a currency note; there were fourteen accused in the case; only one Phani Bhushan Pan was convicted; all the others including myself were acquitted in the Sessions Court; that was seven or eight years ago." The District Judge thus overlooks the elementary principle that where there has been an

(1) (1894) P 151 (159).

(2) (1911) I. L. R. 39 Calc. 245.

acquittal, the acquittal is conclusive ; as Jenkins, C. J., observed in *Emperor v. Noni Gopal* (1), on the authority of the decision in *R v. Plumber* (2), it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. Again, Saileswar Sanyal is discredited because he is a neighbour, while Jitendra Nath Upadhyay is not relied on because he is a chance witness from a distance. The District Judge, however, concedes that the evidence of all these witnesses could be accepted if the will had been executed in the natural way and publicity given to it, though he does not state how the execution was unnatural and how secrecy could have been intended when at least half a dozen strangers were present in the assembly. The District Judge next proceeds to make the general observation that it must be acknowledged that there is no great reluctance in our country in getting up a deed of this kind. There is no trace of evidence in the record to support this remark with regard to the people either of the province in general or of the localities where the lady resided or the will was executed. The Judge then proceeds to rely upon a statement made by Babu Jyotish Chandra Hazra in cross-examination to the effect that Kanty Chandra Ghose and Kailash Chandra Ghose, two members of the Ghose family of Chandranagore, had propounded a will alleged to have been executed by Trailokya Nath Ghose, brother of Kanty Chandra Ghose, that probate of the will was refused by the trial Court, and that during the pendency of an appeal in this Court, the matters in difference were settled by a deed of release dated the 9th March, 1916. It is difficult to see how this statement is relevant to the present proceedings and how it can be admissible in evidence. The recitals in the deed of release are plainly inadmissible, and the document was introduced into evidence for an entirely different purpose, namely, as containing the signature of Rajanibala who had acted as the guardian of her infant grandson Anil Chandra in the transaction. The District Judge plainly should not have allowed his judgment upon the question of the genuineness of the will now in controversy to be affected in the remotest degree by what took place in connection with the alleged will of Trailokya Nath Ghose. Moreover, his observation that the will of Trailokya Nath was designed to cheat his daughters while the present will is intended to save the estate from the effect of the conduct of a dissolute son, can only be regarded as embodying a wholly misleading analogy. This is followed up by the entirely groundless

CIVIL.

1921.

Sarojini Dasi

v.

Haridas.

Mookerjee, J.

(1) (1911) 15 C. W. N. 593, 1. L. R. 38 Calc. 559. (2) (1902) 2 K. B. 339.

CIVIL.

1921.

Sarojini Dasi

v.

Haridas.

Mookerjee, J.

imputation that a friendly neighbour (Saileswar Sanyal) and a young student (the pleader Jitendra Nath Upadhyay) would not be averse to helping a minor. In view of these and other remarks made by the District Judge, we see no escape from the conclusion that the adverse opinion formed by him with regard to the will in dispute is not based upon a consideration and analysis of the positive evidence on the record. He has in fact adopted the method which has been more than once condemned by the Judicial Committee; *Chotey Narain v. Ratan Koer* (1) and *Jagrani Koer v. Durga Parsad* (2). As was observed by Lord Watson in the first of these cases, in order to prevail against such evidence as has been adduced, the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute, an impossibility. This was emphasised by Lord Shaw in the second case, when he added that the objection that the witnesses might have been of a better class is at an end when execution and attestation are proved. A comment of this character has no force except upon something of a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a Court that the witnesses had committed both forgery and perjury. In the case of a will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety. In view of all these circumstances, we cannot attach much weight to the opinion of the trial Judge who had the advantage of seeing the witnesses and noticing their look and manner, as laid down by the Judicial Committee in *Shama Charani v. Kshettor Monee* (3); *Shun Muga v. Manikka* (4); *Bombay Cotton Manufacturing Co v. Moti Lal* (5); *R. v. Bertrand* (6) and other decisions reviewed in *Laljee Mahomed v. Guzdar* (7) and *Surendra Krishna v. Rani Dasi* (8).

We may further observe that the evidence adduced by the

(1) (1894) L. R. 22 I. A. 12; I. L. R. 22 Calc. 519.

(2) (1913) L. R. 41 I. A. 76; I. L. R. 36 All. 93; 19 C. L. J. 165.

(3) (1899) L. R. 27 I. A. 10; I. L. R. 27 Calc. 521.

(4) (1909) L. R. 36 I. A. 185; I. L. R. 32 Mad. 400.

(5) (1915) L. R. 42 I. A. 110; I. L. R. 39 Bom. 386; 21 C. L. J. 523.

(6) (1867) L. R. 1 P. C. 520 (535).

(7) (1915) I. L. R. 43 Calc. 833; 23 C. L. J. 190.

(8) (1920) I. L. R. 47 Calc. 1043; 33 C. L. J. 34.

propounder is practically uncontradicted. We have on the other side some evidence as to realisation of rent from the tenants of the houses after the death of the testatrix. On one occasion Nitai and Krishna jointly demanded rent ; that was apparently to meet the expenses of the Sradh ceremony. The tenant, however, did not pay the rent, and he continued to withhold it when he found there was a dispute as to the title. The only evidence worthy of notice adduced on the side of the caveator is the signature of the testatrix on the release. There may be a controversy as to whether the document was duly proved and received in evidence, but even if we assume that it was really executed by the lady, it does not assist the case of the caveator. The District Judge limited himself to the observation that the signature on the will is firm and not like that of a pale and emaciated lady on the point of death. We have no evidence to show how much vitality the lady possessed three days before her death ; but this much is plain that a comparison of the signature on the will with that on the deed of release is not calculated to excite suspicion. In this connection, reference may be made to the exposition of the methods of proving handwriting given by Jenkins, C. J. in the case of *Barindra Kumar v. Emperor* (1), which was followed in *Pulin Behary v. King-Emperor* (2). The ordinary methods of proving handwritings are (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act ; (ii) by a comparison of handwriting as provided in section 73 of the Evidence Act ; and (iii) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing, must purport to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that person. The section does not specifically state by whom the comparison may be made, though

CIVIL.  
1921.  
Sarojini Dasi  
v.  
Haridas.  
Mookerjee, J.

(1) (1909) I. L. R. 37 Calc. 467 (502).

(2) (1912) 15 C. L. J. 517 (590).

CIVIL.

1921.

Sarojini Dasi

Haridas.

Mookerjee, J.

the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison. A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. In *Phoodce Bibee v. Gobind Chunder Roy* (1), it was said by the Court that "a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution." It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinions of so distinguished a Judge as Mr. Justice Blackburn, who in *Reg v. Harvey* (2) refused to allow a comparison to be made without the help of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution: *Nobin Krishna v. Rassick* (3); *Kurāli Prasad v. Anantaram* (4), specially if no skilled witness has been called to make the comparison; *R. v. Silverlock* (5); *R. v. Harvey* (6); *Doe v. Suckermore* (7); *Rajendaro v. Jogendro* (8); *Rames Chandra v. Rajanikanta* (9). We must further bear in mind that although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. Now it may be conceded that if two signatures are exactly identical, there is room for suspicion that the one in question may be a copy or careful imitation of the genuine signature. It is a fact well-known and may be readily verified that no two signatures, actually written in the ordinary course of writing them are precisely alike. The character

(1) (1874) 22 W. R. 272.

(2) (1869) 11 Cox. C. C. 546.

(3) (1884) I. L. R. 10 Calc. 1047 (1931).

(4) (1871) 8 B. L. R. 490 (502) P. C.; 16 W. R. P. C. 16.

(5) (1894) 2 Q. B. 766.

(6) (1861) 11 Cox. C. C. 546 (548).

(7) (1836) 5 A &amp; E. 703 (734).

(8) (1871) 14 M. I. A. 67; 7 B. L. R. 216; 15 W. R. P. C. 39.

(9) (1893) L. R. 20 I. A. 95; I. L. R. 21 Calc. 1 P. C. 5.

of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent, but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a fac-simile that one is a perfect match to the other in every respect. There is generally diversity in the marks of the pen, the size of the letter, the level of the signature and the space it occupies, that stands as a guard over the genuine signature and characterises it as the true signature. But as was observed by Coleridge J. in *Doe v. Suckermore* (1), "the test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent." Again as Sir J. Nicholl said in *Robson v. Roake* (2), "the best, usually perhaps, the only proper, evidence of handwriting is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write, and who form their opinion from the general character and manner of this, and not from criticising particular letters." I have compared the two signatures and the impression left upon my mind by their prevailing character is that they are signatures of the same person, although on one document she signs her name as Rajanibala and in the other as Rajanimani. But notwithstanding this general correspondence of the signatures, justifying a reasonable inference that they were made by the same person, I do not desire to base my conclusion upon the similarity of the signatures, because, as has been well-observed, it is not difficult to forge the handwriting of almost any person so that it may be impossible for even the most acute and experienced judge to discriminate between the false and the true. Besides, such reliance upon similarity of signatures is unnecessary in the present case, as there is in my opinion a mass of direct and circumstantial evidence which points unmistakably to the genuineness of the will. After an examination of that evidence and a consideration of the criticisms thereon by the District Judge and by counsel for the respondent in this Court, I feel no doubt that the will was duly executed and attested by the testatrix. I may add that it is not necessary here to consider what may be the legal effect of the grant of probate upon the title set up by the caveator.

CIVIL.

1921.

Sarojini Dasi

v.

Haridas.

Mookerjee, J.

(1) (1836) 5 A. &amp; E. 703 (705). (2) (1824) 2 Add. 53 (80-81).

CIVIL.

1921.

Sarojini Dasi

v.  
Haridas.

Mookerjee, J.

The result is that the appeal must be allowed, the decree of the District Judge set aside and the application for letters of administration with copy of the will annexed granted to the appellant with costs in both Courts.

Buckland, J.:— I agree.

A. T. M.

Appeal allowed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

CIVIL.

1921.

January, 10, 11, 12.  
April, 14.

PRASANNAMAYI DEBI

v.

BAIKUNTHA NATH CHATTORAJ AND ANOTHER.\*

*Will—Genuineness of disposition—Provisions prima facie reasonable—Witness, veracity of—Means of contradiction to be produced—Witness, not wealthy if trustworthy—Standard of proof to establish a will—Forgery, question of, in civil suit—Burden of proof—Party propounding a will—Suspicion—Attesting witnesses to will, if all to be examined—Interference with findings of fact by the appellate Court.*

Where the provisions of a will can in no sense be deemed inefficient or unnatural, but, on the contrary, are *prima facie* reasonable, as not disregarding the moral claims of the relatives of the testator which the ties of kinship suggest, they do not excite suspicion as to the genuineness of the disposition: *Sagami v. Durga* (1).

It is not enough to suggest doubts as to the veracity of a witness; if the means of contradiction are available to the party who challenges his truthfulness, these should be produced before the Court.

It cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy.

The standard of proof to establish a will required by the Indian statutes is that of the prudent man and not an absolute or conclusive one: *Sarat Kumari v. Bissessur* (2). The Indian Evidence Act, while adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is, at the same time, expressed in terms which allow full effect to be given to

\* Appeals from Original Decrees Nos. 31 and 35 of 1920, against the decisions of Babu Giris Chandra Sen, District Judge of Bankura, dated the 20th February, 1920.

(1) (1913) L. R. 41 I. A. 76; I. L. R. 36 All. 93; 19 C. L. J. 163.

(2) (1911) I. L. R. 39 Calc. 245; 16 C. W. N. 265.



circumstances or conditions of probability or improbability, so that where forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable : *Cooper v. Slade* (1) and *Devine v. Wilson* (2).

The *onus probandi* lies in every case upon the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator : *Barry v. Butlin* (3) ; in other words, wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed : *Tyrrell v. Painton* (4). The suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Though it is desirable that all the attesting witnesses capable of being called, should be examined to remove all suspicion of fraud, it is not absolutely necessary that where there are many attesting witnesses, the absence of every one not called, should be specifically explained : *Surendra v. Rani Dasi* (5).

The verdict of a Judge trying the case should not be lightly disregarded where the issue is simple and straightforward and the only question is which set of witnesses is to be believed : *Bombay Cotton Manufacturing Co. v. Matilal* (6). But it is otherwise, where the determination of the question of genuineness of a will depends not merely upon assertions of witnesses but upon surrounding facts and circumstances whose existence is either admitted or indisputably proved, and the judgment of the primary Court is vitiated by his failure to test the veracity of the witnesses by reference thereto.

Appeal No. 31 of 1920 is by the Petitioner for probate.

Appeal No. 35 of 1920 is by the Objector in the letters of administration proceeding.

Applications for probate of a will and for letters of administration.

The material facts appear from the judgment of Mookerjee, J.

*Mr. T. C. P. Gibbons* (Advocate-General), *Dr. Dwarka Nath Mitter*, *Babus Pramatha Nath Banerjee*, *Rama Prosad Mookerjee* and *Phanindra Nath Das* for the Appellant.

*Sir Asutosh Chaudhuri*, *Babus Karunamoy Bose*, *Bimala Charan Deb* and *Narendra Krishna Bose* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

- |                                                                        |                                     |
|------------------------------------------------------------------------|-------------------------------------|
| (1) (1857-58), 6 H. L. C. 746 (772).                                   | (2) (1853) 10 Moo. P. C. 502 (531). |
| (3) (1838) 2 Moo. P. C. 480.                                           | (4) (1894) P. 151.                  |
| (5) (1920) 1 L. R. 47 Calc. 1043 (1062) ; 33 C. L. J. 34.              |                                     |
| (6) (1915) L. R. 42 I. A. 120 ; 1 L. R. 39 Bom. 386 ; 21 C. L. J. 528. |                                     |

CIVIL.

1921.

Prasannamayi Debi

v.

Baikuntha Nath.

CIVIL

1921.

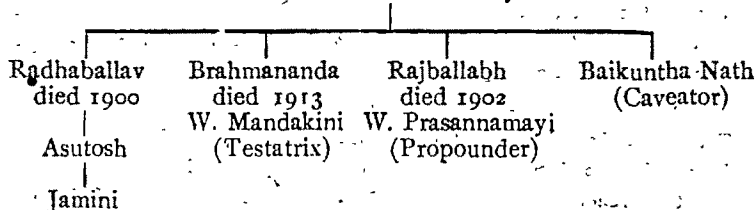
Prasannamayi Debi

v.  
Baikuntha Nath.

April, 14.

**Mookerjee, J.**—The subject matter of the litigations which have culminated in these two appeals is the estate left by one Mandakini Debi, a Hindu lady, who died on the 16th September, 1918. On the 1st October, 1918, Baikuntha Nath Chatteraj, the surviving brother of her deceased husband Brahmananda Chatteraj, made an application for letters of administration to the estate left by her. On the 28th July, 1919, her sister Prasannamayi, the widow of Rajballabh Chatteraj, another brother of her husband, applied for probate of an unregistered will alleged to have been executed by her on the 14th September 1918, two days before her death. The relationship of the members of the family is set out in the annexed genealogical table : .

Madhusudan Chatteraj.



By consent of parties, the administration and probate proceedings were tried on the same evidence. In the probate proceedings, the District Judge came to the conclusion that the genuineness of the will had not been established; accordingly, he granted letters of administration to the petitioner in the other proceedings. Two appeals have, consequently, been presented to this Court by Prasannamayi; Appeal No. 31 of 1920 is directed against the refusal of probate; Appeal No. 35 of 1920 is directed against the grant of letters of administration. The substantial point in controversy is the question of genuineness of the will.

The will purports on the face of it, to have been executed by Mandakini whose name was signed by Natabar Mookerjee, who also signed his own name as the scribe, and there were in addition seven attesting witnesses. The scribe and four of the attesting witnesses have been examined on behalf of the propounder. The will recites that Brahmananda, the husband of the testatrix, had a brother Rajballav who had taken her sister Prasannamayi as his second wife. Brahmananda and Rajballabh used to live in joint mess and estate as members of a Hindu family, and since their death, Mandakini and Prasannamayi had likewise lived in joint mess and estate. Rajballav had bequeathed his property to his widow, that is, to her sister Prasannamayi, and in his will had appointed her husband as

executor. Her husband had taken out probate of the will of his brother and had, out of the income and profits of his own property and of the estate left by his brother, acquired properties in his own name. All these properties he had bequeathed to her and had appointed her cousin (mother's sister's son) Kalibhusan Mookerjee as executor. After these recitals, the testatrix proceeded to give directions for the disposal of her estate in five paragraphs. In the first clause, she dedicated a property to Goddess Durga and appointed Baikuntha Nath (her husband's younger brother) and Asutosh (son of her husband's elder brother) as managers of the property so dedicated. In the second clause, she directed her brother-in-law and nephew-in-law to feed Brahmins annually on the occasion of the Durga Puja, for the spiritual benefit of her husband, out of the income of two other properties. In the third clause, she directed Rs. 1,500 to be spent in the performance of her *sradh* ceremony. In the fourth clause, she directed the residue of her estate to vest absolutely in her sister Prasannamayi. In the fifth clause, she directed the expenses of the annual *sradh* ceremony of herself and of her husband to be met out of the income of the estate vested in her sister. These directions do not seem unnatural; on the other hand, they constitute the kind of disposition which might well have been made by an elderly Hindu lady in the position of the testatrix. She had no children; her sister had married in the same family as herself; their husbands were brothers who had lived joint in mess and estate and separate from their other brothers. Her nearest relations by marriage were her husband's younger brother and elder brother's son. In a family so constituted, it was not surprising that a pious Hindu lady would dedicate some property for the worship of the deity, appoint her brother-in-law and nephew-in-law as managers thereof, make provision for her own *sradh* ceremony and the annual *sradh* ceremonies of herself and of her husband, and leave the residue of the estate to the sister whom she dearly loved. These provisions of the will can in no sense be deemed inofficious or unnatural; on the other hand, they are *prima facie* reasonable, as they do not disregard the moral claims of the relatives of the testatrix which the ties of kinship suggest; they are consequently not calculated to excite suspicion as to the genuineness of the disposition: *Jagrani v. Durga* (1). We now proceed to consider the evidence as to the actual execution and due attestation of the will by the testatrix; but before we do so, it is necessary to state the circumstances which led up to the discovery

(1) (1913) L. R. 41 I. A. 76; I. L. R. 36 All. 93; 19 C. L. J. 165.

CIVIL.

1921.

Prasannamayi Debi

v.

Baikuntha Nath.

Mookerjee, J.

CIVIL

1921.

Prasannamayi Debi

v.

Baikuntha Nath.

Mookerjee, J.

of the will, for, as will presently appear, their true bearing upon the question of genuineness of the will has not been fully appreciated by the trial Judge.

As previously stated, the applicant for letters of administration presented his petition to the District Judge on the 1st October, 1918. On the same date, the District Judge made an order for the appointment of Babu Lalit Mohan Banerjee, a pleader, as commissioner to make an inventory of the articles and cash to be found in the iron safe and boxes belonging to the deceased. The commissioner went to the residence of the deceased on the following day. Thereupon, Prasannamayi objected to the interference of the commissioner on the ground that her sister Mandakini had bequeathed all her properties to her by means of a will. She further stated that the key of the iron chest in which the movable properties left by the deceased were kept was not with her, but was with Kalibhushan Mookerjee, the son of her mother's sister, who lived in Pakhanna 14 miles off. She added that she trusted no body else and would not open the iron chest or box till he came. She further declined to show anything as she had got everything in pursuance of the will. What she stated was reduced to writing by the commissioner, and, later on in the day, she asserted again that her sister Mandakini had bequeathed her property to her by means of a will. The commissioner submitted a report to the Court on the following day, in which he explained his inability to make an inventory. On the 3rd October, the District Judge recorded that Prasannamayi claimed the property under a will, directed her to show cause on the 6th November, 1918, why she should not be criminally prosecuted for disobedience of the orders of the Court, and issued instructions that in the meantime the boxes and the safe containing the property of which an inventory was sought to be made, be kept by the commissioner in a separate room under seal, the key of the room to remain in the custody of the commissioner. On the 4th October, the commissioner again went to the residence of the deceased, collected the movables left by her, made a list thereof and placed them in a separate room which was locked up and sealed by him. The contempt proceedings against Prasannamayi dragged on for sometime, but were subsequently abandoned. On the 21st December, 1918, a reference to arbitration was made at the instance of the parties, but this also, as might have been anticipated, proved infructuous in the end, as the question of the genuineness of a testamentary instrument cannot be settled by compromise. Ultimately, the commissioner again went to the residence of the deceased under

the orders of the Court dated the 31st January, 1919. He reached the place on Saturday, the 1st February, opened the room on the following day, and made a list of the safes, boxes and other articles as also of their contents. This list was filed in Court on the 3rd February, 1919, and contained the following entry :

"IRON CHEST

Contents.

(1) Unregistered will of Srimati Mandakini Debi by the pen of Natabar Mookerjee of Pratasayar, dated 28th Bhadra, 1325 B. S.

(2) Draft of a will by Srimati Mandakini Debi. These two are tied in a piece of cloth".

The list, as expressly stated in the report of the commissioner dated 3rd February, 1919, was prepared by him in the presence of Kalibhushan Mookerjee, Baikuntha Nath Chatteraj (the petitioner) and Babu Upendranath Das, pleader for Prasannamayi. The articles found in the room were, after the preparation of the list, left there, and the room itself was again locked up and sealed. On the 3rd February, 1919, that is, the day after the discovery of the will in the iron safe), Prasannamayi made a petition to the arbitrators in which she recited the previous incidents and prayed that they might send for the will. On the requisition of the arbitrators the District Judge directed the commissioner on the 10th February to bring the documents and file them in Court. On the 16th February, the commissioner went to the house again, "brought the unregistered will and a draft of a will found in an iron safe" and filed them in Court on the following day, "wrapped in a piece of cloth." It is thus clear that the will was inside an iron safe which was locked up and placed inside a room, the doors whereof were locked up and sealed by the commissioner and remained so sealed from 4th October 1918 up till 2nd February, 1919. Consequently, the will must have been in existence as early as the 4th October, 1918. It has been boldly suggested, however, that the will might have been manufactured later and smuggled into the iron safe when the room was opened and the safe was unlocked on the 2nd February, 1919. But there is manifestly no foundation whatever for this ingenious suggestion which is not based on any evidence in the record. As already stated, the commissioner reported to the Court on the 3rd February, 1919, that he had prepared the list of the contents of the room and of the safes and boxes in the presence of Baikuntha Nath Chatteraj, and the list specified in explicit terms "the will and draft tied in a piece of cloth," as found among the contents of the iron

CIVIL.

1921.

Prasannamayi Debi

v.

Baikuntha Nath.

Mookerjee, J.

CIVIL.  
1921.  
Prasannamayi Debi  
v.  
Baikuntha Nath.  
Mookerjee, J.

chest. Baikuntha Nath might have forthwith objected that this was an incorrect statement, and that the will was smuggled in when the safe was opened by the commissioner; his omission to take exception at the time is significant, and no weight can be attached to the much belated afterthought that the will might have been surreptitiously introduced into the safe when it was opened by the commissioner. Such a suggestion plainly involves a serious charge of carelessness against the commissioner, and he should in all fairness have been examined before the charge could be entertained. On the other hand, such evidence as there is on the record including the statement of the caveator as to what took place when the commissioner opened the room and unlocked the safe, indicates that the work was done in the presence of many people, anxiously watching the proceedings; in such circumstances it is improbable in the highest degree that a desperate attempt would be made to smuggle in the two documents, or, that if made, it should escape detection. We must consequently hold that the will and the draft were inside the iron safe on the 4th October, 1918 when it was placed inside the room which was locked up and sealed by the commissioner. This conclusion, as we shall presently see, is supported by reliable evidence on the record.

Natabar Mookerjee, the god-son of the testatrix and the writer of the will, has deposed that he used to serve in the Nakarka Colliery, (Post Kotwalgar, District Manbhum) 300 or 400 miles distant from his house which was about 6 miles off from the residence of Mandakini and that he came home in September, 1919, to see his wife who was ill and also to negotiate for the marriage of his daughter. On or about the 13th September, he went to see Mandakini as usual as she was his god-mother and found her ill. Prasannamayi also was ill, and, according to the witness, both of them probably had an attack of influenza. He was told that Mandakini would execute a will. On his stating that he had no experience in will drafting, she said that she had a draft prepared by Upendra Babu of Bankura who was her retained pleader from before. The draft was in a wallahmirah, wrapped up in a rag. The draft showed that Mandakini was willing away in favour of Prasannamayi and Prasannamayi was in her turn willing away in favour of Mandakini. The draft in fact was for a mutual will. Natabar did not approve of the draft, and on the suggestion of Rajendra Narayan Biswas, Babu Bhutnath Mahdai, a pleader of the Burdwan Bar, who had come to the village on business was called in. The pleader examined the draft and dictated the will to Natabar who wrote it out. After the will had been written out, it was read over and

explained to Mandakini by the witness. At her request, he signed her name as executant. Bhutnath Mandal also became a witness and he was followed by other attesting witnesses. The will was then taken to Prasannamayi who was lying bedridden in another room. As she was not able to get up, she asked the witness to take it back to Mandakini. After she had been helped to get up, she went into another room and kept the will and draft tied up in a rag inside an iron chest. It was in this safe that the two documents were found on the 2nd February, 1920. On this evidence, it is difficult to realise how a doubt could be seriously raised as to the genuineness of the will. The Court below, however, has not taken a comprehensive view of the case and has looked at every incident with suspicion which appears to us to be groundless. The attempt to break down Natabar Mookerjee in cross-examination was by no means successful. The suggestion was made that he was not present in the village and in the house of Mandakini on the date of execution of the will. He emphatically repudiated the imputation. If his statement was untrue, he could have been completely contradicted by Janakiballav Hazra, his superior officer in the colliery where an attendance register was kept; but it is significant that though his name was included in the list of witnesses, effective steps were not taken to serve the writ on him and to place him in the witness box. The warrant issued against Janaki was not served for want of an identifier, and the application for re-issue of process was renewed at so late a stage of the case, that the District Judge rightly refused to grant it. It is further clear from the evidence of Natabar Mookerjee that subsequent to his return to the colliery after the execution of the will, he did not go back to the village for many weeks. A post card written by him on the 7th November 1918, to Prasannamayi is alleged to have been found on or about the 2nd December, 1918 in a window in the house though it is not mentioned by Baikuntha in his examination-in-chief. The contents of this communication, which the witness was never called upon to explain, have been supposed to militate against the theory that Natabar was present when the will was executed. The letter, however, is capable of a very different interpretation, and is consistent with the view that when Natabar left Mandakini, her illness had not taken a serious turn (as, indeed, is shown by other evidence on the record) and also that Natabar was not informed of her death for some considerable time. The letter was evidently written on receipt of intimation of news of her death from Prasannamayi who communicated with him while the proceedings for contempt were pending against

CIVIL

1921.

Prasannamayi Debi

v.  
Baikuntha Nath.

Mookerjee, J.

CIVIL.

1921.

Prasannamayee Debi

Baikuntha Nath.

Mookerjee, J.

her. The letter brings out the very important fact that even on the 7th November, 1918, Natabar was at the colliery and thus corroborates his assertion that he did not return to the village till after its date. This also could have been verified or contradicted if the petitioner had secured the attendance of the colliery officer Janakiballav Hazra and secured the production of the attendance register. It is not enough to suggest doubts as to the veracity of a witness; if the means of contradiction are available to the party who challenges his truthfulness, these should be produced before the Court. We must consequently take it as established beyond reasonable doubt that Natabar was present at the house of Mandakini on or about the 14th September, 1918, took part in the preparation of the will and did not again return to the village till after the 7th November, 1918. This conclusion completely demolishes the theory that the will was manufactured after the death of Mandakini on the 16th September, 1918, for, as has already been shown, the will was inside the iron safe as early as the 4th October, 1918. If Natabar, the scribe of the will, was 300 or 400 miles away, at the colliery, from the 15th September, 1918, to the 7th November, 1918, the question inevitably arises, when and where did he manufacture the will to be placed inside the iron safe not later than the 4th October, 1918. No hypothesis, probable or improbable, has even been suggested as a satisfactory solution of this crucial difficulty in the path of the respondent.

Apart from this, there is other weighty evidence, besides that of Natabar Mookerjee, to support the genuineness of the will. The testimony of Babu Upendra Nath Das, a pleader of long standing of the Bankura bar, is unimpeachable. He asserts that he prepared the draft which was subsequently found inside the iron safe along with the will. There is no inherent improbability in the terms of the draft, which could be used either for a mutual will or for a will by one of the sisters in favour of the other. The trial Judge has summarily discarded the evidence of the pleader, because he could not remember the date when he made the draft; the suggestion apparently was that he might have prepared it after the death of the testatrix. This is a mere hypothesis, not supported by evidence. The Judge has further commented adversely upon the circumstance that the witness did not produce his accounts; the obvious answer is that he was never called upon to do so, even though he offered, when asked in cross-examination about his accounts, to produce them on the following day. The objection that the accounts of Mandakini were not produced is equally futile;



her papers, if any, were in the custody of the commissioner and no attempt was made to examine them. In our opinion, there is no reason why the evidence of Babu Upendranath Das, so far as it goes, should not be accepted as a perfectly honest and straight-forward statement. But if the pleader is unable to recall the exact time when he prepared the draft, the date is fixed with some approach to accuracy by Trailokyanath Karak who was formerly in the service of Mandakini. He swears that he was sent by Mandakini to Babu Upendranath Das to get the draft prepared and that this took place not less than 10 nor more than 30 days before her death. The witness also describes the incidents connected with the actual execution and attestation of the will. There is no reason why he should be disbelieved, except the fact that he had been in the service of Mandakini. We need not refer in detail to the evidence of Nagendranath Ghose whose statements do not seem probable, and whose cross-examination was improperly disallowed even after he had turned hostile, [*Surendra v. Rani* (1)], nor, is it necessary to rely upon Surendranath Mandal whose manner is described by the Judge as suspicious. But we do not see adequate reasons for rejecting the testimony of Babu Bhutnath Mandal, a pleader of the Burdwan Bar. The District Judge was evidently annoyed when it was found difficult to secure his attendance, but the explanation offered by him for his failure to attend punctually has the ring of truth. Apart from this, his evidence in support of the will was trustworthy and remained unaffected by cross-examination. It may be noted that the Judge considers him unworthy of credit because his professional income as a lawyer is small; but clearly it cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy, and the Judge himself does not hesitate to believe Kalipada Ray, a witness for the caveator, though his income as a medical man is equally limited. The position, then, is that there is a large body of respectable evidence in support of the case made by the propounder, and that evidence fits in with the two cardinal points that the will must have been in existence as early as the 4th October, 1918, and that no hypothesis has been propounded to show that the will could have been manufactured after the 15th September and before the 4th October, 1918. As against this evidence, the caveator produced a physician Kalipada Ray who asserted that he was approached in January or February, 1919, with a request that he should for a consideration of Rs. 400 become witness to a will

CIVIL.

1921.

Prasannamayee Debi

v.

Balkuntha Nath.

Mookerjee, J.

(1) (1920) I. L. R. 47 Cal. 1043 (1057); 33 C. L. J. 34.

CIVIL

1921

Prasannamayee Debi

Baikuntha Nath

Mookerjee, 9

executed by Mandakini, and a deed writer Anantalal Ghosh who alleged that he had been invited in the middle of November, 1918, to forge a will by Mandakini for a bribe of Rs. 200. These witnesses are obviously unreliable, and their statements must be deemed untrue when it is remembered that at the dates spoken to by them the will was inside the iron safe. The other witnesses give evidence of a negative character which does not neutralise that adduced by the petitioner. The adverse comments made upon the evidence of Prasannamayee are really not justified; there is nothing to show that she knew that the will which had been taken to her and returned, was deposited in the iron safe; it is further not shown that she obtained the key of the safe after the death of her sister or that, if she had the key, she ever opened it and examined the contents; she may have heard of the matter during her illness, but it is not improbable that as stated by her in her petition to the arbitrators on the 3rd February, 1919, it may have escaped her memory. In these circumstances, we are clearly of opinion that the District Judge has arrived at an erroneous conclusion on the question of the genuineness of the will. His judgment shows that his opinion is not based upon a careful analysis of the evidence and has been influenced by unfounded suspicion. As was pointed out by Jenkins, C. J. in *Jarat Kumari v. Bissessur Dutt* (1) the standard of proof to establish a will required by the Indian statutes is that of the prudent man and not an absolute or conclusive one. The Indian Evidence Act, while thus adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability; so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability; though the standard of proof to the exclusion of all reasonable doubt, required in a criminal case may not be applicable: *Cooper v. Slade* (2); *Devine v. Wilson* (3). If the evidence is tested from the point of view just indicated, it leaves no room for escape from the conclusion that the will was in fact executed by Mandakini.

The only other question which could possibly arise would be that of her testamentary capacity. On this part of the case, however, Sir Asutosh Chaudhuri conceded that if it was found that the will

(1) (1911) 1 L. R. 39 Calc. 245; 16 C. W. N. 265.

(2) (1857-58) 6 H. L. J. 746 (772).

(3) (1835) 10 Moo. P. C. 502 (531).

had been in fact executed by Mandakini, he could not contend that she had not at the time a sound disposing mind. No doubt, as pointed out by the Judicial Committee in *Barry v. Butlin* (1) the onus probandi lies in every case upon the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator; in other words, as stated by Lord Davey in *Tyrrell v. Painton* (2), wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. The suspicion to which allusion is thus made must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. Considered in the light of these principles, the question of testamentary capacity is free from difficulty. The evidence adduced by the propounder affords overwhelming proof that the testatrix was in full possession of her mental faculties when she executed the will, and this is borne out even by the evidence of Bijaychandra Ghose, Jaminibhushan Chatteraj and Bipinbihari Mandal called by the caveator. We have further the important fact that the will was executed according to a draft prepared at the instance of Mandakini some time before her illness and there is nothing to indicate that Prasannamayee influenced the disposition in her favour. Some stress was laid, not unnaturally, on the circumstance that all the attesting witnesses were not called; but though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that where, as here, there are many attesting witnesses, the absence of every one not called should be specifically explained; *Surendra Krishna v. Rani Dasi* (3).

It has been finally urged that the Court should be slow to interfere with the findings of fact of the trial Judge who saw and heard the witnesses and had an opportunity of noting their demeanour. This is a salutary rule and it may be conceded that as pointed out by the Judicial Committee in *Bombay Cotton Manufacturing Co. v. Matilal* (4), the verdict of a Judge trying the case should not be lightly disregarded where the issue is simple and straight forward and the only question is which set of witnesses is to be believed. The case before us is of a different description. Here the determination

CIVIL.

1921.

Prasannamayee Debi

v.  
Baikuntha Nath.

Mookerjee, J.

(1) (1838) 2 Moo. P. C. 480.

(2) (1894) P. 151.

(3) (1920) I. L. R. 47 Calc. 1043 (1062); 33 C. L. J. 34.

(4) (1915) L. R. 42 I. A. 110; I. L. R. 39 Bom. 386; 21 C. L. J. 528.

CIVIL.

1921.

Prasannamayee Debi

Balakuntha Nath.

Mookerjee, J.

of the question of genuineness depends not merely upon assertions of witnesses but upon surrounding facts and circumstances whose existence is either admitted or indisputably proved, and the judgment of the District Judge is in our opinion vitiated by his failure to test the veracity of the witnesses by reference thereto. The decisions reviewed in *Laljee Mahomed v. Guzdar* (1), and *Surendra Krishna v. Rani Dasi* (2), show that two conflicting view points have to be reconciled, namely, on the one hand the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions, and on the other hand the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. We have kept in view these considerations and have arrived at the conclusion that the opinion of the District Judge on the question of the genuineness of the will cannot be supported on a right appreciation of the evidence.

The result is that the appeals must be allowed and the will admitted to probate. The application for probate is granted while the application for letters of administration is dismissed. The appellant will have costs in both Courts in the two proceedings.

**Buckland, J.**—I agree.

A. T. M.

*Appeal allowed.*

(1) (1915) I. L. R. 43 Calc. 833 (849) ; 23 C. L. J. 190.

(2) (1920) I. L. R. 47 Calc. 1043 (1059) ; 33 C. L. J. 34.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.

SANATAN SANT AND ANOTHER

v.

DINABANDHU GIRI AND ANOTHER.\*

Civil.

1921.

July, 22.

*Decree, execution of—Decree absolute, incapable of execution—Decree, amendment of—Time, when runs—Limitation Act (IX of 1908), Sch. I. Art. 182.*

Where the original decree is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up: *Muhammad Suliman v. Muhammad yar* (1) followed.

A preliminary decree on a mortgage suit was passed on the 19th June, 1910. On the 10th July, 1913, the decree was made absolute. The decree not having contained the names of the decree-holders and judgment-debtors except one, was amended on the 26th August, 1916:

*Held*, that time ran from the date of amendment and an application for execution of decree made on the 9th July, 1919, was in time.\*

Appeal by the Judgment-debtors.

Application for execution of mortgage-decree.

The material facts appear from the judgment.

*Babu Santosh Kumar Pal* for the Appellants.

*Babu Apurba Charan Mukherji* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the judgment-debtors against an order for execution of a mortgage-decree and for sale of the properties covered thereby. The mortgage suit, which was instituted on the 23rd March 1910, resulted in a preliminary decree on the 19th June 1910 under O. 34. R. 4. C. P. C. On the 4th June 1913 an application was made for a final decree. On the 10th July 1913, an order was recorded in the following terms: "Service of notice on the defendants proved. No objection is raised. The period of redemption fixed in the decree has expired. No payment appears to have been made. Ordered that the decree be made absolute." On the basis of this order a final decree was drawn up under O. 34. R. 5. C. P. C. on the 18th August, 1916, the decree-holders put in a petition for amendment of the final decree. Thereupon

July, 22.

\*Appeal from Appellate order No. 182 of 1920 with Rule No. 586 and Review Rule No. 451 of 1920, against the order of K. K. Sen Esq, District Judge of Midnapore, dated the 3rd March, 1920, reversing that of Babu Hira Lal Das Gupta, Munsiff of Contai, dated the 8th August, 1919.

(1) (1894) 1. L. R. 17 All. 30.

\*See also Limitation Act (IX of 1908), Sch. I. Art 182 Cl. (4)—Rep.

CIVIL.

1921.

Sanatan

Dinabandhu.

Mookerjee, J.

"the following order was recorded on the 26th August 1916. It appears that the clerk who wrote the final decree in this suit did not write therein the names of the decree-holders and of all the judgment-debtors. Hence it is ordered that the said decree be amended by writing therein the names of the decree-holders and judgment-debtors. I should add here that the clerk is no longer attached to this Court and so I myself cannot take any notice of his neglect of duty." On the 9th July 1919, an application for sale of the mortgaged property was made by the decree-holders. The Court of first instance dismissed the application as barred by limitation. Upon appeal, the District Judge has reversed that order and directed execution to proceed.

On the present appeal, it has been contended on behalf of the judgment debtors that the application is barred by limitation as time ran, not from the 26th August 1916, when the amended decree was prepared but from the 10th July 1913, when a final decree was first drawn up. We are of opinion that this contention should not prevail.

It is clear that the final decree as drawn up on the basis of the order of the 10th July 1913 was incapable of execution. It did not set out the names of any of the decree-holders or the names of the judgment-debtors except one. In this respect, it did not fulfil the requirements of rule 6 of order 21 of the Code of Civil Procedure. On these facts, the principle enunciated by Sir John Edge C. J. in the case of *Muhammad Su'eman Khan v. Muhammad Yar Khan* (1) applies. In that case, the decree as originally framed was found by the High Court to be incapable of execution. It was not finally amended by that Court so as to become capable of execution, until nearly 12 years after it was passed. It was held that an application to execute such decree, which was made within three years from the date of the amendment, was within time—the rule of limitation applicable being that prescribed by article 179 of schedule II of the Limitation Act, 1877. The first paragraph of the third column of article 179 only applies when there is a decree or order which can be executed; that paragraph necessarily contemplates the existence of a decree capable of execution at the date of the decree. The same principle was applied in *Bahari v. Risal* (2). In that case the decree absolute did not set out a description of the properties directed to be sold. On the other hand, the decree as drawn up ordered the sale of a non-existent village and was

(1) (1894) 1 L. R. 17 All. 39.

(2) (1908) 5 A. L. J. 403.

consequently incapable of execution. In these circumstances the Court held that time ran, not from the date when the order absolute was originally made but from the date when a proper decree capable of execution was drawn up. We do not lay down the proposition that wherever a decree is amended time runs from the date of the amendment; the principle adopted in the two cases just mentioned is that where the original decree is incapable of execution time runs from the date when a proper decree capable of execution, has been drawn up. Reference may in this connection be made to *Brojo Lal v. Tara Prasanna* (1), where the distinction between amendments of different scopes is explained.

We are, accordingly, of opinion that the view taken by the District Judge is correct and that this appeal must be dismissed with costs, hearing-fee one gold mohur.

The Review Rule is discharged without costs.

The Rule for stay of proceedings is also discharged without costs.

A. T. M.

*Appeal dismissed: Rules discharged.*

(1) (1905) 3 C. L. J. 188.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

RAJA BHUPENDRA NARAIN SINGH BAHADUR

v.

MADAR BUX SHEIKH AND OTHERS.\*

*Putni sale—Putni Regulation (VIII of 1819), sections 8, clause (2), 10—Notice to be stuck up in Collector's catchery—Requirements of Putni Regulation to be strictly conformed—Forms, observance of.*

Section 10 of Putni Regulation contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held.

\* Appeal from Original Decree No. 206 of 1919, against the decree of P. C. De, Esq., District Judge of Birbhum, dated the 24th July, 1919.

CIVIL.

1921.

Sanatan

v.

Dinabandhu.

*Mookerjee, J.*

CIVIL.

1921.

July, 5, 6, 7.  
August, 23.

## CIVIL.

1921.

Raja Bhupendra  
Narainv.  
Madar Bux.

The notice to be stuck up in the cutchery of the Collector, like the petition, must contain specification of the balances that may be due to the zemindar concerned from all the putnidars under him and a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter.

Strict conformity with the requirements of the Putni Regulation in respect of the contents and service of the notice mentioned in sections 8 and 10 is essential to secure a valid sale: *Maharaja of Burdwan v. Tarasundari* (1) and other cases.

The zemindar is exclusively answerable for the observance of the forms prescribed in section 8, clause (2) of the Putni Regulation.

Appeal by the Defendant.

Suit for reversal of a sale of a putni taluk.

The material facts appear from the judgment:

• *Sir Asutosh Chaudhri, Babus Preo Sankar Majumdar, Phanindra Lal Maitra, Asitaranjan Ghose and Pramatha Nath Banerjee* for Defendant No. 1 Appellant.

*Babus Mahendra Nath Ray, Mohini Mohan Chakrabarti, Hari Narain Chowdhry and Bire war Bagchi* for the Plaintiff, Respondent.

*Babu Manmatha Nath Ray* for Defendant No. 2 Respondent.

*Babu Surendra Nath Ghosal* for Defendant No. 3 Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal by the zemindar defendant in a suit commenced on the 12th April, 1915, under section 14 of Regulation VIII of 1819 for reversal of the sale of a patni taluk held under the Regulation on the 15th May, 1914. The validity of the sale was attacked on a variety of grounds. One of these grounds was that the requirements of section 8 of the Regulation had not been fulfilled, and this was formulated in the ninth issue in the following terms:

"Were the Astom petition, notice, istahar and all the proceedings connected therewith, good and valid according to law and were notice and istahar duly served."

The District Judge has answered this question in favour of the putnidar and has, for this reason, set aside the sale as invalid. On the present appeal by the zemindar, the conclusions of the District Judge have been assailed as erroneous.

(1) (1882) L. R. 10 I. A. 19; 1 L. R. 9 Calc. 619.

August, 23.



Section 8, clause 2 of the Patni Regulation requires the zemindar to present a petition to the Collector containing a specification of any balances due to him on account of the expired year from all or any patni talukdars. This petition must be stuck up in some conspicuous part of the Collector's cutcheri with a notice that if the amount claimed be not paid before the 1st Jaistha following, the tenure of the defaulter will on that day be sold by public sale in liquidation. This must be read with section 10, which provides that at the time of sale, the notice previously stuck up in the cutchery shall be taken down and the lots be called up successively in the order in which they may be found in that notice. This makes it plain that section 10 contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held. This conclusion is confirmed by an important provision contained in section 8, Cl. 2 which is expressed in the following terms: "A similar notice shall be stuck up at the sadar cutchery of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent, to be similarly published at the cutchery, or at the principal town or village upon the land of the defaulter." This leaves no room for doubt that the notice to be stuck up in the cutchery of the Collector, like the petition, must contain specification of the balances that may be due to the zemindar concerned from all the patnidars under him and that a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter. There can thus be no serious controversy as to the correctness of the view adopted by this Court in the case of *Bejoy Krishna v. Lakshmi Narain* (1), regarding the contents of the notice which is required to be stuck up in the cutchery of the Collector under section 8 and to be taken down at the time of the sale under section 10, so that the lots may be called up successively in the order in which they may be found in that notice.

We have now to judge by this test, whether the zemindar who is exclusively answerable for the observance of the forms prescribed in section 8, clause 2, has established that the statutory requirements were carried out. The notice which has been produced (Exhibit P) obviously does not fulfil the requirements of the Regulation; it does

(1) (1919) 30 C. L. J. 433.

Civil.

1921.

Raja Bhupendra  
Narain

Madar Bux.

Mookerjee, J.

**CIVIL.**  
**1901.**  
**Raja Bhupendra**  
**Narain**  
**vs.**  
**Madar Bux.**  
**Mookerjee, J.**

not contain a specification of the balances due from all the patnidars; it mentions only the patni, now in suit, though the oral evidence makes it clear that "there were about forty Astam cases in which the Raja of Nashipore was interested." The zemindar has consequently been driven to bring forward oral evidence to establish that another notice, showing all the defaulting patnidars and the balances due from each of them was stuck up as required by the Regulation. Sailajaprasad Sengupta deposes that while he was jamanabis in the service of the Maharaja of Nashipore, a notice used to be drawn up showing all defaulting patnidars in two parts—one was published in the sadar cutchery of the zemindar and the other was sent to the Raj pleader Sasibhushan Chaudhuri at Birbhum. The pleader, who is also the ammuktear of the zemindar, has been examined. He asserts that he stuck up in the Collectorate two notices of Astam sales, one, of the mal, and the other, of the debutter mahal. The District Judge has not accepted this assertion, and after careful consideration of all the circumstances, we are unable to disagree with him. The memory of the witness as to the time when the alleged notices were put up is clearly at fault. He asserts that he saw stuck up on the notice board of the Collector the notice Exhibit P before the 12th or 13th Baisak, and he fortifies this statement by the further assertion that he examined the board between the 10th and the 13th. This must be incorrect, because the peon, who stuck up the notices, did not receive them for publication till the 14th Baisak. Apart from this, no explanation is forthcoming why notices in respect of individual patnis should be stuck up, though not required by the Regulation, and complete notices as required by the Regulation should be subsequently stuck up. Besides, it is a matter for legitimate comment that while the notice (Exhibit P) was stuck up by the Collectorate peon in the discharge of his usual duties, the alleged comprehensive notice was put up by the ammuktear. It does seem strange that a private individual should stick up the proper notice as required by the Regulation, while the inappropriate notice is stuck up by the officer concerned. The evidence also shows that the notice board is in a glass case, that there are iron-safes and chests about a cubit below the place where the notices are hung, and that a sentry "armed with gun" walks up and down by that place. An attempt by a stranger to stick up notice on a notice board so placed could not fail to attract attention, and independent evidence might be expected of the endeavour made by the witness to comply with the requirements of the statute. There is finally the significant fact that the notices alleged to have

been stuck up by the witness on the notice board of the Collector were not found on the records, which contained, however, the notice (Exhibit P). In these circumstances, we are not prepared as a Court of appeal to pronounce the opinion that the view taken by the trial Court is erroneous. But even if it were conceded that the requisite notice had been put up by the ammuktear as alleged by him, there is no evidence to show that it was taken down at the time of the sale as required by section 10 and that the lots were called up successively in the order in which they stood in that notice. Indeed, the notice does not appear to have been seen by any one except the ammuktear. In this connection, we must take the statement of Upendranath Sadhu, who was the revenue peshkar of the Collector at the time, that the Maharaja of Nashipore always has a separate petition for each tenure. The witness was present with the Collector when the patni was sold and so also was the ammuktear of the zeminder. The witness asserts that the ammuktear filed before the Collector a list of arrears and the mufasil notice, that the witness read them to the Collector who signed them and then the sale took place. To the same effect is the testimony of Anantalal Ghosal, another assistant in the Collectorate who was present at the sale. The evidence of Surendra Mohan Kar, who was the naib nazir of the Collectorate at the time, does not afford the slightest indication that the notice alleged to have been put up by the ammuktear had ever been stuck up or seen by anybody or taken down at the time of the sale. He asserts that on the 27th April, that is, the 14th Baisakh, the records of the Astam case were made over to Shaikh Amin the peon (since deceased) for publication, that the witness himself went later and found that the records were hung up in the proper place, that they remained there till the day of sale, and that on that day the records were brought down and arranged by the witness and sent to the revenue peshkar with reports of service by the peon. The witness added that from the time of publication until they were returned to the munshikhana, they remained in charge of the nazir (who has died since) and that he himself had never noticed any record short when the record was brought down. If the additional notice, alleged to have been put up by the ammuktear himself, had been on the notice board when the records were brought down on the day of sale and arranged by this witness, it could hardly have escaped his notice. On a review of the evidence relevant to this question, we hold in concurrence with the District Judge, that the zemindar has not discharged the burden, which the law imposes upon him, to establish that a notice fulfilling the

Civil.  
1921.  
Raja Bhupendra  
Narain  
v.  
Madar Bux.  
Mookerjee, J.

CIVIL

1921

Raja Bhupendra  
Narainv.  
Madar Bux

Mookerjee, J.

requirements of section 8 was stuck up in some conspicuous part of the cutchery of the Collector; the only notice which is shown to have been stuck up does not satisfy the statutory requirements. This by itself is fatal to the sale; for, as repeatedly emphasised by this Court as also by the Judicial Committee, strict conformity with the requirements of the Regulation in respect of the contents and service of the notice mentioned in sections 8 and 10 is essential to secure a valid sale; *Maharaja of Burdwan v. Tara-sundari* (1); *Maharani of Burdwan v. Krishnakamini* (2); *Ahsanulla v. Hurri Churn* (3), affirmed in *Ahsanulla v. Hari Churn* (4); *Hurro Doyal v. Mahomed Gazi* (5); *Rajnarain v. Ananta* (6).

In view of our conclusion on this point, it is not necessary to investigate whether there was due service of the requisite notices at the sadar cutchery of the zemindar and at the cutchery or at the principal town or village upon the land of the defaulter. The District Judge has held that the zemindar has failed to prove by satisfactory evidence that those notices were really or properly published. His criticisms on the evidence may in some places seem unduly searching, but it is needless for us to embark upon a review of his conclusion based upon an appreciation chiefly of oral testimony, as, in our opinion, the sale must be cancelled on the ground already stated.

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1882) L. R. 10 I. A. 19; I. L. R. 9 Calc. 619.

(2) (1886) L. R. 14 I. A. 50; I. L. R. 14 Calc. 365.

(3) (1890) I. L. R. 17 Calc. 474.

(4) (1892) L. R. 19 I. A. 191; I. L. R. 20 Calc. 86.

(5) (1891) I. L. R. 19 Calc. 699.

(6) (1892) I. L. R. 19 Calc. 703.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.

PULIN BIHARI ROY AND OTHERS

v.

MAHENDRA CHANDRA GHOSAL AND OTHERS.\*

CIVIL.

1921.

June, 22, 23, 24,

27, 28.

August, 24.

Partnership—Improperly constituted appeal—Civil Procedure Code (Act V of 1908), O. 30, suit under—Names of partners disclosed—Death of one of the partners—Legal representatives, application by, for substitution—Application barred by limitation—Limitation Act (IX of 1908), Sch. 1, Art. 176—Partners, other, application by, to make them co-respondents—Inherent power—Account, reopening of—Partnership, dissolution of—No fixed term agreed upon for dissolution—Presumption—Continuance of partnership—Accounts—Scope and extent—Partner carrying on business of same nature and competing with that of firm, liability of—Contract Act (IX of 1872), section 257—Notice—Evidence Act (I of 1872), Secs. 66, 114 Illus. (g), 164.

A suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or, in the event of his death *pendente lite*, in the absence of his legal representatives: *Raj Chunder v. Gangadas* (1).

When an appeal has abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear, this depends upon the nature and scope of the suit: *Kall Dayal v. Nagendra Nath* (2).

A suit contemplated by order 30 of the Code of Civil Procedure may be brought by or against a firm in the firm name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the date of dissolution: *Davis v. Morris* (3). This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person: *Ex parte Corbett* (4) and other cases. The proceedings in a suit so brought continues in the name of the firm, even though the names of the partners are disclosed: Order 30 rule 2 of the Code of Civil Procedure.

In the plaint, although the suit was described as a suit by a firm against three other firms, the names of the members of the firms were disclosed. During the pendency of the appeal, one of the members of the plaintiff firm died on the 20th June 1920. On the 3rd January, 1921, the three sons of the deceased applied under order 30 rule 4 (2) of the Code of Civil Procedure, as his legal representatives to be added as parties appellants. This application was dismissed on the 21st June, 1921, under article 176, schedule I of the Limitation Act. Three days later, the

\*Appeal from Original Decree No. 163 of 1919, against the decree of Babu Jagadis Chandra Goswami, Subordinate Judge of Chittagong, dated the 30th April, 1919.

(1) (1904) I. L. R. 31 Calc. 487.

(2) (1919) 24 C. W. N. 44.

(3) (1883) 10 Q. B. D. 463.

(4) (1880) 14 Ch. D. 126.

## CIVIL

1921.

Pulin

Mahendra.

surviving appellants applied to the Court to add as respondents to the appeal the legal representatives of the deceased co-appellant, who had, through their remissness, failed to join as appellants within the prescribed time :

*Held*, that the Court had under the circumstances, inherent power to add a respondent to the appeal : *Hemangini v. Haridas* (1) and other cases.

An account once taken in the presence of the parties interested and acquiesced in by them will not be lightly re-opened : *McKellar v. Wallace* (2) and other cases.

Where no fixed term has been agreed upon for the duration of a partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners : *Crawshaw v. Maude* (3) and another case. But the dissolution takes place as from the date of the communication of the notice : *Mellersh v. Keen* (4).

Where persons who intended to retire from the partnership business did continue to take things from the business and to associate otherwise with its work, a presumption may be drawn in favour of the continuance of the partnership : *Parsons v. Hayward* (5) and another case.

The accounts in a suit for recovery of money due on adjudication of accounts upon dissolution of a partnership business, have to be taken for the benefit of all the persons concerned, the scope and extent of such accounts must be determined by the Court on the true state of facts disclosed in the evidence and cannot be restricted to the limited measure of relief claimed by the plaintiff on inaccurate allegations.

If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby : *Aas v. Ben-Nam* (6) and other cases. The rule is not applicable to a really different business, though the same knowledge and information may be useful in both.

Section 257 of the Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion, in certain cases, however, arises after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the presumption recognised in illustration (g) to section 114 of the Evidence Act may be applied, namely, that evidence which could be and is not produced has been withheld, because if produced it would be unfavourable to the person who withholds it : *Hem Chandra v. Kali Prosanna* (7). In such circumstances, secondary

(1) (1918) 3 Pat. L. J. 409. (2) (1853) 5 M. I. A. 372 ; 8 M. P. C. 378.

(3) (1818) 1 Swanston 503 ; 18 R. R. 132.

(4) (1859) 27 Beav. 236.

(5) (1862) 4 DeG. F. & J. 474 ; 135 R. R. 249.

(6) (1891) 2 Ch. 244.

(7) (1903) 1 L. R. 39 Calc. 1033 ; 3 C. W. N. 1.

evidence will become admissible, and the party who has withheld the documents will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Evidence Act.

Appeal by the Plaintiffs.

Suit for recovery of money due on adjudication of accounts upon dissolution of a partnership business.

The material facts appear from the judgment.

*Dr. Diwarka Nath Mitter, Babus Manindra Nath Banerjee and Rama Prosad Mookerjee* for the Appellants.

*Babus Bipin Behary Ghose and D. L. Khastgir* for Third Party Defendant Respondent.

*Babu Narendra Kumar Das* for Second Party Defendant Respondent.

*Babu Prakas Chandra Pakrasi* for the First Party Defendant Respondent.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee J.**—This is an appeal by the plaintiffs in a suit for recovery of money due on adjustment of accounts upon dissolution of a partnership business, called the Joint Salt Bond Business, and carried on by them and the three sets of defendants at Sadarghat, Chittagong. The plaintiffs constitute a firm styled Krishnadas Sanatan Brajendra Kumar Ray. The first party defendants are members of a firm known as Krishna Kumer Ghosal; the second party defendants are members of a firm styled Ramkamal Radha-ballabh Saha; the third party defendants are members of a firm named Gangadas Seal. In the salt business, the Rays claim a five annas nine pies share, the Ghosals four annas share, the Sahas four annas six pies share and the Seals one anna nine pies share. The business was managed by the different sets of partners during the four quarters of the year by turns, namely, the Ghosals during the first quarter, the Seals during the second quarter, the Sahas during the third quarter and the Rays during the fourth quarter. The partnership was started in 1306 B. E. for the purpose of importing salt from foreign ports and selling it in Chittagong. The Rays had a firm in Calcutta which ordinarily purchased salt for the joint business, and the purchase money had to be paid by the defendant partners to them at Chittagong. If there was delay in payment on the part of any set of partners, it became liable to the set which made the payment on its behalf. There was a book kept called

CIVIL.

1921.

Pulin

Mahendra.

August, 24.

CIVIL.

1921.

Pulin

v.

Mahendra.

Mookerjee, J.

the order book in which the price for sale of salt as fixed by the partners from time to time was recorded. Each set of partners could sell as much salt as it liked out of the joint stock, but was liable for the excess taken by it over that due for its share to the set or sets of partners who might have taken less than a proportionate share. There used to be a periodical adjustment of accounts generally at the end of each quarter which is described in these proceedings as a Bantan. The term literally signifies division. The Bantan, it is said, was intended to remove inequalities in the appropriation of salt by the partners and to settle the amount of money due among the partners *inter se* by reason of such inequality. In addition to the Bantan, there was a Nikash which was intended to be held annually, but in fact took place at irregular intervals. The term Nikash signifies final adjustment of accounts, and one of the points in controversy in the Court below was, how far a Bantan might be treated as a final settlement. The business was carried on in this manner, according to the plaintiffs, to the end of 1320 B. E. and they claim accounts from 26th Sraban 1320 up to 30th Chaitra, 1320, as according to them the Bantan had taken place for the antecedent period. The defendants urged, on the other hand, that the Nikash which alone constitutes final account, had not been held for the period subsequent to 1316 B. E. and that the partnership did not terminate till the end of 1321 B. E. The defendants consequently claimed that accounts might be taken for the entire period between the commencement of 1317 B. E. and the termination of 1321 B. E. The Subordinate Judge has given effect to the contention of the defendants in this respect. To appreciate the full significance of the claim of the defendants that accounts might be taken for the longer instead of the shorter period, it is essential to bear in mind that some of the plaintiffs had, during the year 1321 B. E. if not also during 1320 B. E., engaged in another salt business, and the question consequently arose whether they had rendered themselves liable to account to their partners for the profits of such separate business. The plaintiffs retorted that other partners had acted in a similar manner, specially, with respect to salt imported in S. S. Baron Balfour. The Subordinate Judge has held that the partners who had engaged in rival salt business before the dissolution of the partnership were liable to render mutual accounts. The plaintiffs have appealed against the decree of the Subordinate Judge and have assailed his decision upon every material point. The grounds which emerge for consideration may, however, be concisely enumerated, namely, first, that the Bantans which covered the



period up to 25th Srabani 1320 B. E. were final adjustments and could not be reopened ; secondly, that the salt bond business was dissolved at the end of 1320 B. E. and not at the end of 1321 B. E. ; thirdly, that even if the partnership business be not deemed to have been dissolved at the end of 1320 B. E., each partner was entitled to have separate dealings in salt and could not be called upon to account for the profits of such transactions ; fourthly, that if such separate dealings in salt were improper, the defendants could at most get compensation to the extent of Rs. 5,000 ; fifthly, that the Court should not, at this stage, have gone into the question of the custody of the account books, and that, in any event, the investigation has been inadequate and the conclusion incorrect.

Before we deal with these grounds, it is necessary to refer to a preliminary objection to the competency of the appeal. In the plaint, although the suit was described as a suit by a firm against three other firms—each of them partners in the salt business—the names of the members of the firms were disclosed. During the pendency of the appeal, Brajendra Kumar Ray, one of the members of the plaintiff firm, died on the 20th June, 1920. On the 3rd January 1921, the three sons of the deceased applied as his legal representatives to be added as parties appellants. This application, made under order 30, rule 4(2) (a), (iv.) Procedure Code, was opposed on the ground that it was barred by limitation under Art. 176 of the schedule to the Limitation Act, which provides that an application under the Code of Civil Procedure to have the legal representatives of a deceased plaintiff or a deceased appellant made a party must be made within six months from the date of the death of the deceased plaintiff or appellant. This period of six months, it may be noted, has been reduced by Act XXVI of 1920 which received the assent of the Governor-General on the 2nd September, 1920 and came into force on the 1st January, 1921 ; that, however, did not affect the position of the parties. The petitioners contended that they were entitled to apply within three years under article 181. We hold that the application was governed by article 176 and that as no satisfactory reasons had been assigned for the delay, the application must be dismissed. This order was made on the 21st June, 1921 ; three days later, the surviving appellants applied to the Court to add as respondents to the appeal the legal representatives of the deceased co-appellant, who had, through their remissness, failed to join as appellants within the prescribed time. The surviving appellants urged that they should not be made to suffer by reason of default on the part of the legal representatives of the deceased co-

CIVIL.

1921.

Pulin

v.

Mahendra.

Mookerjee, J.

CIVIL.

1921.

Pulin

v.

Mahendra.

Kookerjee, J.

appellant; and that the Court should, under order 41, rule 20 or order 41, rule 33, or, if, neither of these rules was considered applicable, in the exercise of its inherent power recognised in section 151, add as respondents to the appeal the representatives of the deceased, so that no exception might be taken that the appeal was not properly constituted. We granted this application, because apart from all questions as to the scope of order 41, rule 20 and order 41, rule 33, the Court has inherent power to add a respondent to the appeal in the events which had happened; *Hemangini v. Haridas* (1); *Laksmichand v. Kachubhai* (2). The objection taken by the respondents that the appeal had ceased to be properly constituted by reason of the death of one of the appellants and the failure of his legal representatives to join as co-appellants within the time allowed by law, thus became unsubstantial. No doubt, as pointed out by the Judicial Committee in *Raj Chunder Sen v. Gangadas Seal* (3), a suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or, in the event of his death *pendente lite*, in the absence of his legal representative. It may also be conceded that when an appeal has abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear; this depends upon the nature and scope of the suit; *Kali Dayal v. Nagendra Nath* (4). In the present case, however, no such difficulty arises, as all the parties interested are now before the Court either as appellants or as respondents. Apart from this, there is considerable force in the contention of the appellants that the addition of the representatives of the deceased was unnecessary, inasmuch as the suit as framed was a suit of the description contemplated by order 30 of the Code of Civil Procedure. Such a suit may be brought by or against a firm in the firm-name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the date of dissolution; *Davis v. Morris* (5); *Re Wenham* (6). This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person: *Ex parte Corbett* (7); *Ellis v. Wadson* (8); *Sadler v. Whiteman* (9), affirmed in *Whiteman v. Sadler* (21) and cited in *Rex v. Holden* (11). The proceedings in a

(1) (1918) 3 Pat. L. J. 40.

(2) (1911) I. L. R. 35 Bom. 393.

(3) (1904) I. L. R. 11 Calc. 487.

(4) (1916) 24 C. W. N. 44.

(5) (1883) 10 Q. B. D. 463.

(6) (1900) 2 Q. B. 698.

(7) (1880) 14 Ch. D. 126.

(8) (1894) 1 Q. B. 714.

(9) (1910) 1 K. B. 868.

(10) (1910) App. Cas. 514.

(11) (1912) 1 K. B. 487.

CIVIL.

1911.

Pulin

v.

Mahendra.

Mookerjee, J.

suit so brought continues in the name of the firm, even though the names of the partners are disclosed; order 39, rule 2 C. P. C. The case before us is not that of a suit brought in the names of particular individuals, as in *Monmohan v. Bidhu Chusan* (1), but rather that of a suit brought in the firm-name, as in *Bal Kissen v. Kanhya* (2). From this standpoint, no valid objection could be taken to the competence of the appeal, even if the representatives of the deceased were not added as parties. In our opinion, the preliminary objection cannot be sustained, and the appellants are entitled to our judgment on the matters in controversy.

As regards the first ground, we are of opinion that the accounts must be taken, notwithstanding the Bantans which have taken place as found by the Subordinate Judge. The Subordinate Judge has correctly held that there were two sets of accounts taken, the Bantan and the Nikash. The scope and object of the two were not identical, as is clear from the samples of the Bantan and the Nikash which have been produced. The Bantan was an adjustment of the dues of the partners *inter se* on account of the inequality in the proportion of salt taken by each set of partners on their own account for sale by them to their own customers as opposed to joint sale of salt by the joint firm. Such an adjustment would show what quantity of salt had been taken by each set of partners and how much money would have to be contributed by one set to another on account of inequality in the appropriation. On the other hand, the Nikash at the end of the year would show the outstanding balance from customers of the joint business and expenditure of all descriptions incurred during the year. Opportunity would, no doubt, be taken on the occasion of this yearly settlement of accounts, to rectify the errors, if any, in the Bantan, which would, *prima facie*, form the basis of the annual account. But there has apparently been some misapprehension as to the true relation of a Bantan to a Nikash. One extreme view is that the Bantan may be entirely ignored and the Nikash taken irrespective thereof. The opposite extreme view is that the Bantan is absolutely conclusive and that its accuracy cannot be challenged at the time of the Nikash. Neither of these views can clearly be supported. The Bantan was regularly taken in the presence of the parties or their representatives, though its scope was limited. Consequently, if its accuracy is challenged at the time of the Nikash, the burden lies upon the party who assails it to establish the alleged error. The elementary principle that an account once taken in the presence of the parties

(1) (1913) 28 C. L. J. 268.

(2) (1913) 17 C. L. J. 648.

CIVIL.

1921.

Pulin

Mahendra:

Mookerjee, J.

interested and acquiesced in by them will not be lightly reopened must plainly be applied to a Bantan; *McKellar v. Wallace* (1); *Mohesh v. Radha Kishore* (2); *Gokul v. Sasimukhi* (3); *Magniram v. Laxminarayen* (4); *Jehangir v. Hope Mills* (5). Subject to this reservation, the Bantan cannot be treated as a conclusive answer to the claim for accounts for any period. This, however, does not, as the Subordinate Judge has correctly held, affect the decree in the former suit brought by the Rays against the Seals and finally decided by this Court on the 4th December, 1919. That decree confirmed the decision of the primary Court, and, though conclusive between those parties, expressly left unaffected all matters outside the scope of the accounts comprised in that litigation. The direction given by the Subordinate Judge in this respect is not open to criticism.

As regards the second ground, the evidence is conclusive that the salt bond business was not dissolved at the end of 1320 B. E., but continued till the end of 1321 B. E. The case for the plaintiffs is that the dissolution was effected by the retirement of Jogendrkrishna and Nilkrishna, two of the members of the plaintiff firm, from the salt business at the end of 1320 B. E. Now, it is well-settled that where no fixed term has been agreed upon for the duration of a partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners; *Crawshaw v. Maule* (6). But the dissolution takes place as from the date of the communication of the notice: *Mellersh v. Keen* (7). Tested in the light of this principle, the case for the plaintiff firm completely collapses. In the matter of the alleged dissolution by retirement, the parties acted in the most unbusinesslike way imaginable. The obvious course was to communicate their intention to dissolve the partnership, in writing to the other partners. It is not necessary to consider whether notice to the defendant firms would have been sufficient or whether notice to each individual member of each of the firms concerned was essential. No written notice was in fact given, and the oral evidence of verbal intimation to some of the persons interested is of the vaguest description. On the other hand, the evidence discloses that the persons who intended to retire from the business did in

(1) (1853) 5 M. I. A. 372; 3 M. P. C. 378.

(2) (1907) 12 C. W. N. 28; 6 C. L. J. 580.

(3) (1911) 15 C. L. J. 204.

(4) (1908) I. L. R. 32 Bom. 353.

(5) (1908) I. L. R. 33 Bom. 216.

(6) (1818) 1 Swanston 508; 18 R. R. 132.

(7) (1859) 27 Beav. 236.

fact continue to take salt from the business, and to associate otherwise with its work. In such circumstances, a presumption may legitimately be drawn in favour of the continuance of the partnership; *Parsons v. Hayward* (1); *King v. Chuck* (2). There is, in our opinion, no reasonable doubt as to the soundness of the conclusion of the Subordinate Judge that there was no effective dissolution of the firm at the end of 1320 B. E. and that it was continued till the end of 1321 B. E. In such a contingency, it was not only open to the Court but incumbent upon it, to direct the accounts to be taken for a longer period than that mentioned in the plaint. The accounts in a suit of this description have to be taken for the benefit of all the persons concerned; the scope and extent of such accounts must be determined by the Court on the true state of facts disclosed in the evidence and cannot be restricted to the limited measure of relief claimed by the plaintiff on inaccurate allegations.

As regards the third and fourth grounds, we have been invited to hold that each partner was entitled to have separate dealings in salt and could not be called upon to account for the profits of such transactions for the benefit of all the partners of the original business. This contention is opposed to the elementary rule that if a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby. This obligation is formulated in section 259 of the Indian Contract Act and has long been recognised as a fundamental rule in the law of partnership: *Aas v. Benham* (3); *Trimble v. Goldberg* (4); *Glassington v. Thwaites* (5). The rule is not applicable to a really different business, though the same knowledge and information may be useful in both. In the case before us, however, there is no doubt as to the true nature of the separate business carried on by some of the members of the salt bond partnership. The evidence makes it abundantly clear that the separate transactions were of precisely the same nature as the business carried on by the partnership and that there was thus a breach of duty of the partners concerned not to carry on like business in the same field of competition. The correctness of the view taken by the Subordinate Judge cannot be successfully questioned. We

CIVIL.

1921.

Pulin

v.

Mahendra.

Mookerjee, J.

(1) (1862) 4 DeG. F. &amp; J. 474; 135 R. R. 249.

(2) (1853) 17 Beav. 325; 99 R. R. 169.

(3) (1891) 2 Ch. 244. (4) (1906) App. Cas. 494.

(5) (1823) 1 Sim &amp; St. 124; 24 R. R. 153.

CIVIL

1921.

Pulin

Mahendra.

Mookerjee, J.

may add in this connection that it was faintly suggested that the sum recoverable on account of this breach of obligation was limited by agreement to Rs. 5000. The agreement however does not admit of such a construction; the sum of Rs. 5000 mentioned therein was prescribed as a penalty and does not absolve the parties in default from the obligation to account for all the profits made in such business.

As regards the fifth ground, it has been urged that the Court should not at the preliminary stage have gone into the question of the custody of the account books, that the investigation has at any rate been inadequate and that the conclusion is not supported by the evidence. We are of opinion that this contention should prevail. Section 257 of the Indian Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion in this case, will, however, arise after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Indian Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the presumption recognised in illustration (g) to section 114 of the Indian Evidence Act may be applied, namely, that evidence which could be and is not produced has been withheld because if produced it would be unfavourable to the person who withholds it; *Hem Chandra v. Kali Prosanna* (1). In such circumstances, secondary evidence will become admissible, and the party who has withheld the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Indian Evidence Act. The procedure as to notice was not followed in the Court below, and it has transpired that some of the account books, namely, the books of 1318 B.E., 1319 B.E. and one of the books of 1320 B.E. were at the time the plaintiffs were called upon to produce them actually in this Court in the records of the appeal preferred in the previous suit brought by the Rays against the Seals. These books appear to have been subsequently returned to the plaintiffs, and they have expressed their readiness to produce them whenever called upon. In these circumstances, we are of opinion that the finding in the judgment of the Subordinate Judge relating to the custody of the account books should be ex-

(1) (1903) 1 L. R. 30 Calc 1033; 8 C. W. N. 1.

punged and that the direction in the decree based thereon should be omitted. When the enquiry is undertaken by the commissioner, proper orders as to the production of account books and other papers by all the partners will be given by the Subordinate Judge on the lines indicated above.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified in two respects, namely, first, as to the use to be made of the Bantan when the accounts are taken, and, secondly, as to the omission of the order for production of account books; subject to these variations, the decree of the Subordinate Judge will stand confirmed. The appellants will pay the respondents their costs in this appeal, but such costs will include only half the hearing fee, as the objection to the competence of the appeal has not been sustained and the decree of the Court below has not been affirmed in its entirety.

A. T. M.

*Appeal allowed in part.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

RAJA SASHIKANTA ACHARYYA.

v.

RAJA SARAT CHANDRA RAI CHAUDHURI.\*

*Mesne profits—Decree, interpretation of—Order, validity of, questioning—Elements for determination in assessment of mesne profits—Revenue sale auction-purchaser—Estate, nature of, taken—Adverse possessor—Civil Procedure Code (Act XIV of 1882), Sec. 211—'Decree'—Time for payment, running of—Interest—Bona fide and mala fide trespassers.*

Reference may legitimately be made to the judgment in the suit, and, if need be, to the pleadings, to interpret the decree: *Kali Krishna v. Secretary of State* (1) and other cases.

The validity of an order made at one stage of a litigation, unless forthwith challenged by an appropriate proceeding in a superior tribunal, is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage: *Krishna Bahari v. Brajerwari* (2) and other cases.

\* Appeals from Original Decree Nos. 233 and 243 of 1919, against the decree of Babu Hem Kumar Neogi, Subordinate Judge of Rajshahi, dated the 18th June, 1919.

(1) (1888) L. R. 15 I. A. 186; I. L. R. 16 Calc. 173.

(2) (1875) L. R. 2 I. A. 283.

CIVIL.

1921.

Pulin

v.

Mahendra.

Mookerjee, J.

CIVIL.

1921.

July, 7, 8, 11, 12,  
13, 14, 15.  
August, 1, 25.

CIVIL.

1931.

Raja Sashikanta

Raja Sarat Chandra,

The annual income, the period of time and the rate of interest are the elements which should be determined before the actual amount of mesne profits can be assessed.

A purchaser at a sale for arrears of revenue does not derive his title from the defaulting proprietor but takes the estate from the Crown as it stood at the time of its inception as a permanently settled estate.

A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and, if not so surrendered, is liable for mesne profits, as he unlawfully keeps the purchaser out of possession.

For the purpose of interpreting section 211 of the Code of Civil Procedure of 1882, the term 'decree' means the decree of the final Court: *Bhup Indai v. Bijai Bahadur* (1).

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes both the decrees cannot exist simultaneously: *Ram Charan v. Lakhi Kant* (2).

The balance of judicial opinion is in favour of the view that when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree.

The period of three years for payment of mesne profits should be calculated from the date of the ultimate decree which is the only decree capable of, and brought in, execution.

In no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession: *Ibbes v. Richardson* (3).

Interest should ordinarily be allowed on mesne profits, though, inasmuch as the interest forms an integral part of mesne profits; the interest is as much in the discretion of the Court as the mesne profits themselves: *Girish Chunder v. Sashi Shikharanwar* (4).

All trespassers, whether, *bona fide* or *mala fide*, are liable for mesne profits: *Byjnath v. Badhoo* (5); and *Mugun v. Surbeisor* (6); the *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser: *Altaf v. Lalji* (7), and *Dakshina v. Saroda* (8).

Appeals by the Judgment-debtor and Decree-holder.

- (1) (1900) L. R. 27 I. A. 209; I. L. R. 23 All. 152.
- (2) (1871) 7 B. L. R. 704 F. B.; 16 W. R. 1 F. B.
- (3) (1831) 9 A. & E. 849 (853).
- (4) (1900) L. R. 27 I. A. 110; I. L. R. 27 Calc. 951 (969).
- (5) (1868) 10 W. R. 486. (6) (1867) 8 W. R. 479.
- (7) (1877) I. L. R. 1 All. 518.
- (8) (1893) I. L. R. 20 I. A. 160; I. L. R. 21 Calc. 142.



Application for ascertainment of mesne profits.

The material facts appear from the judgment.

*Babus Jog s Chunder Roy, Gobinda Chunder De Roy, Bhupendra Chunder Guha and Pramatha Nath Banerjee* for the Appellant in No. 233 and for the Respondent in No. 243.

*Babus Basant Coomar Bose, Priya Sankar Majumdar and Rama Prosad Mookerjee* for the Respondent in No. 233 and for the Appellant in No. 243.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee, J.**—These two appeals are directed against a decree for the ascertainment of mesne profits in continuation of a suit for recovery of possession of land with mesne profits. Neither the judgment-debtor nor the decree-holder has been satisfied with the decision of the Subordinate Judge; the former considered the amount awarded as excessive, while the latter deemed the amount inadequate. Consequently, both the parties have appealed, and all the points in controversy between them have been elaborately re-argued in this Court. Upon one material point, however, the parties have, since the close of the arguments, wisely come to an agreement, as will presently be explained, and the matters which actually require our decision have thereby been substantially reduced to a narrow compass.

The subject matter of the litigation was an area of 2720 bighas approximately, which the plaintiff claimed as included in mouza Shyampur, Paharpur, within his zemindari mahal No. 218. The defendant claimed that the lands appertained to and had been permanently settled as Mahals No. 219 and 45 of which he was the proprietor. The plaintiff was the purchaser of mahal No. 218 at a sale for arrears of revenue, held on the 14th January, 1891, and confirmed on the 15th March, 1891. The plaintiff instituted the present suit for recovery of possession and mesne profits on the 23rd December, 1903. The suit was decreed by the Subordinate Judge on the 27th March, 1905. On appeal to this Court the decree of the Subordinate Judge was confirmed on the 22nd May, 1908. The defendant there upon appealed to His Majesty in Council, with the result that the Judicial Committee, held on the 20th July, 1914, that the judgment and decree appealed from should stand and that the appeal should be dismissed with costs. The judgment of the Judicial Committee is reported in *Surja Kant v. Sarat Chandra* (i). The order in Council was made on the 10th August,

(i) (1914) 20 C. L. J. 563.

CIVIL.

1921.

Raja Sashikanta  
v.  
Raja Sarat Chandra,

August, 25.

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra.

Mookerjee, J.

1914. The decree-holder thereafter made the present application on the 13th December, 1915 for assessment of mesne profits in execution of the order of His Majesty in Council. He prayed that possession of the decretal lands might be delivered to him and that mesne profits might be decreed so as to cover a period of three years before the institution of the suit and the period from the date of the institution of the suit to the date of delivery of possession. After a full enquiry, the Subordinate Judge has assessed mesne profits at Rs. 85, 916; of this sum Rs. 41,712 represents the principal amount and Rs. 44, 204 the interest thereon. The period for which mesne profits have been allowed extends from the 23rd December, 1899, that is, from three years prior to the institution of the suit, to the 1st April, 1917 when possession was delivered to the decree-holder. This decree has been assailed before us on six grounds, namely, first, that the decree for mesne profits as made in the suit is vague and incapable of execution; secondly, that the plaintiff is not entitled to mesne profits for any period antecedent to the suit; thirdly, that the plaintiff is not entitled to mesne profits for any period subsequent to three years from the date of the decree made by the Subordinate Judge on the 27th March, 1905; fourthly, that, in any event, the plaintiff was not entitled to mesne profits after the 18th November, 1916, when the defendant relinquished possession of the decretal lands; fifthly, that interest should not have been allowed on the profits at the rate of 12 per cent per annum; and sixthly, that the mesne profits have been calculated on an erroneous basis and without adequate enquiry.

As regards the first ground, we are of opinion that the decree for mesne profits made in the suit is neither indefinite nor incapable of execution. As pointed out by the Judicial Committee in *Kali Krishna v. Secretary of State* (1), the decree where necessary may be interpreted by reference to the judgment. The decree made by the Subordinate Judge on the 27th March, 1905, was in these terms: "that the claim for mesne profits be decreed, the amount of which will be ascertained in the execution department." This decree, it will not be overlooked, was made when the Civil Procedure Code of 1882 was in force and was expressed in terms familiarly used at that time. The claim was set out in the decree in the same terms as in the plaint and was formulated as follows: "that mesne profits for the disputed lands described in the schedule, for three years previous to the institution of the suit and also for the period after the institution of the suit till date of obtaining

(1) (1888) L. R. 15 I. A. 186; 1, L. R. 16 Calc. 173.

possession, may be ascertained, and a decree may be passed for the same, together with interest on the same for each year at the rate of one per cent. per month." There is manifestly no indefiniteness about the claim for mesne profits. The decision in *Wise v. Rajendur Coomar* (1) which was followed in *Ram Manickya v. Juggunath* (2) is clearly distinguishable, and no useful purpose would be served by an attempt to test whether the decree for mesne profits made in this suit is indefinite and incapable of execution by reference to observations made with regard to a decree made in another suit and expressed in different terms. The cases mentioned as also the decisions in *Huronath v. Indoo Bhoosun* (3); *Ram Lochun v. Munsoor* (4); *Janokée v. Raj. Kristo* (5), and *Bunsee v. Nuzuf Ali* (6) merely show that in executing a decree for mesne profits, the terms of the decree as to the period during which mesne profits are to be allowed must be strictly adhered to; substantially to the same effect is the decision in *Mon Mohun v. Secretary of State* (7). If there were any ambiguity, the presumption might well be made that the Court intended to allow mesne profits for the period allowed by law; *Trailokya v. Jogendra* (8); *Uttamram v. Kishordas* (9); *Narayan v. Sono* (10). We hold accordingly that there is no real substance in the first contention of the judgment-debtor appellant. Indeed, the decree-holder has argued that the decree for mesne profits as made in the suit is so definite and specific, that none of the questions raised by the judgment-debtor (except the question of amount) is really open for discussion. We are not prepared to accept this extreme contention. It is not disputed that the validity of an order made at one stage of a litigation, unless forthwith challenged by an appropriate proceeding in a superior tribunal, must be regarded as conclusive between the parties and cannot be questioned or collaterally attacked at a later stage; See *Krishna Behari v. Brajeswari* (11); *Mungul Persad v. Grija Kanta* (12); *Ram Kirpal v. Rup. Kuar* (13); *Bani Ram v. Nanhu Mal* (14); *Hook v. Administrator-General* (15); *Raja Rajeswara*

CIVIL.

1921.

Raja Sashikanta

Raja Sarat Chandra

Mookerjee, J.

(1) (1869) 11 W. R. 200.

(2) (1879) 1. L. R. 5 Calc. 563.

(3) (1866) 6 W. R. Mis. 33.

(4) (1869) 11 W. R. 339.

(5) (1871) 15 W. R. 298.

(6) (1874) 22 W. R. 328.

(7) (1890) 1. L. R. 17 Calc. 968.

(8) (1908) 1. L. R. 35 Calc. 1017.

(9) (1899) 1. L. R. 24 Bom. 149.

(10) (1899) 1. L. R. 24 Bom. 345.

(11) (1875) L. R. 2 I. A. 283.

(12) (1881) L. R. 8 I. A. 123; 1. L. R. 8 Calc. 51.

(13) (1883) L. R. 11 I. A. 37; 1. L. R. 6 All. 269.

(14) (1884) L. R. 11 I. A. 181; 1. L. R. 7 All. 102.

(15) (1921) L. R. 48 I. A. 187; 33 C. L. J. 405.

**CIVIL**

1921.

**Raja Sashikanta**

v.

**Raja Sarat Chandra****Mookerjee, &**

*Sethupati v. Velusami* (1). On the other hand, reference may legitimately be made to the judgment in the suit to interpret the decree and to ascertain what the Court has really decided; see *Kali Krishna v. Secretary of State* (2); *Jagatjit v. Sarabjit* (3); *Raja Bhup Indar Bahadur v. Bijai Bahadur* (4). That such reference to the judgment, and if need be, to the pleadings is justifiable, is also clear from the decisions in *Robinson v. Dulcep Singh* (5); *In re May* (6), and *Houstoun v. Marquis of Sligo* (7). Now, when we examine the judgment of the Subordinate Judge in the suit, it becomes manifest that the only question he determined was the liability of the defendant for mesne profits. He did not consider the annual income, the period of time and the rate of interest, — elements which must be determined before the actual amount of mesne profits can be assessed. Consequently, the decree of the Subordinate Judge, as interpreted by his judgment, leaves no room for controversy that when he directed that “the claim for mesne profits be decreed, the amount of which will be ascertained in the execution department,” he decided nothing beyond this that the defendant was liable for mesne profits and that the questions of annual income, period of time and rate of interest, which are all essential factors for the ascertainment of the “amount” were left open for investigation at a later stage. See *Makund Singh v. Sasaswati Bibi* (8). The first objection taken by the judgment-debtor consequently fails.

As regards the second ground, the judgment-debtor has contended that he should not be made liable for mesne profits for any period antecedent to the institution of the suit; indeed, it has even been argued that he should not also be made liable for the period of pendency of the suit in the Court of first instance. It has been urged that he was a *bona fide* trespasser, and in this connection, reference has been made to the decision of this Court dated the 17th March, 1877 in a suit instituted by one Amarchand Lahatta (at that time interested in mahal No. 218) against the plaintiff in the present litigation (who was then as now interested in mahals Nos. 219 and 45). In that suit, the boundary line between the estates held by the rival claimants was determined. The appellant contends that he was in possession of the disputed lands by virtue of

(1) (1920) 25 C. W. N. 581 P. C.

(2) (1888) L. R. 15 I. A. 186; I. L. R. 16 Calc. 173.

(3) (1891) L. R. 18 I. A. 165 (176); I. L. R. 19 Calc. 159.

(4) (1900) L. R. 27 I. A. 209; I. L. R. 23 All. 152.

(5) (1878) 11 Ch. D. 798.

(6) (1883) 25 Ch. D. 231 (236).

(7) (1885) 29 Ch. D. 448.

(8) (1912) 29 C. L. J. 245.

the decision in that suit; but this is not quite accurate, for the evidence in the suit made it abundantly clear that he had overstepped the boundary as demarcated in the earlier litigation. This, however, is not very material. The plaintiff as purchaser of the estate No. 218 at a sale for arrears of revenue was not concluded by the decree in the previous litigation, as he did not derive his title from the defaulting proprietor but took the estate from the Crown as it stood at the time of its inception as a permanently settled estate. The investigation in the present litigation shows that the delineation of the boundary in the earlier suit was incorrect, and that, in substance, is the basis of the decision of the Judicial Committee. The plaintiff is consequently entitled to recover with mesne profits whatever tract of land has been found to have been included in fact in the estate exposed for sale by the revenue authorities. By no fiction of law can we hold that the appellant was lawfully in possession under the colour of the decree in the previous suit after the revenue sale had actually taken place, which transferred the title to the purchaser with retrospective effect from the date of default whereby the interest of the defaulting proprietor in the estate was in essence determined, as stated by Lord Atkinson in *Surja Kanta v. Sarat Chandra* (1). There is consequently no analogy between the present case and the litigation which culminated in the decision of the Judicial Committee in *Banwari Lal v. Mahesh* (2). That is an authority for the proposition that where in a suit by the sons to set aside an alienation by their father a conditional decree for possession on payment of portion of the consideration found to be binding on the estate is passed, the sons are not entitled to mesne profits, as the possession of the alienee was not unlawful. To the same effect is the decision of the Madras High Court in *Ganesha v. Amirthasami* (3); see also *Bhrigunath v. Narsingh* (4). Nor can the appellant invoke the aid of the principle that where the party in possession is not a trespasser at all until his title is made void by entry, as where he holds against the reversioner or remianderman by virtue of a fine levied by the tenant for life, mesne profits can only be recovered from the date of such entry; *Compere v. Hicks* (5); *Hughes v. Thomas* (6). The decision in *Peruvian Guano Co. v. Dreyfus* (7), which was applied by the Judicial

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra

Mookerjee, J.

(1) (1914) 20 C. L. J. 563 (566).

(2) (1918) L. R. 45 I. A. 284; J. L. R. 41 All. 63.

(3) (1918) Mad. W. N. 892; 23 Mad. L. T. 245.

(4) (1916) I. L. R. 39 All. 61.

(5) (1767) 7 T. R. 727. (6) (1811) 13 East. 474.

(7) (1892) App. Cas. 166.

## CIVIL

1921.

Raja Sashikanta.

Raja-Sarat Chandra.

Mookerjee, J.

Committee in *Dakshina v. Saroda* (1), also does not advance the contention of the appellant, and the same observation applies to *Livingstone v. Rawyards Coal Co.* (2), and *Palmer v. Wick* (3). There is further no shadow of an imputation of laches on the part of the plaintiff, as there was in the case of *Juggurnath v. Shah Mahomed* (4), where the Judicial Committee disallowed mesne profits antecedent to the suit. It has been ingeniously argued; however, that the appellant as an adverse possessor was an encumbrancer, and that till he had notice, by institution of this suit, that the purchaser at the revenue sale desired to annul his incumbrance, his possession was lawful, and he could not be held liable for mesne profits. In support of this position, the appellant has invoked the aid of the decisions in *Ramratan v. Aswini Kumar* (5), and *Dursan v. Bhawani* (6), which, on examination, are found to be clearly distinguishable and of no assistance whatever to his contention. In these cases, the person in possession was an under-tenure-holder. The purchaser at the revenue sale brought a suit for ejectment and mesne profits. It was ruled that for the period antecedent to the suit for annulment of the incumbrance, the possession of the under-tenure-holder was not wrongful and that the purchaser at the revenue sale was not entitled to claim by way of damages for use and occupation any sum in excess of what actually represented the rent payable by the under-tenure-holder. This principle clearly cannot be applied to an adverse possessor who occupies the land without payment of rent to the proprietor, as if he were the holder of a valid rent-free grant. If the contention of the appellant were to prevail, the result would be entirely different from what happened in *Ramratan v. Aswini* (5), and *Dursan v. Bhawani* (6). In those cases, the under-tenure-holder was made to pay to the purchaser at the revenue sale rent for the lands in his occupation; here the appellant, who was in possession without title, would be in a more advantageous position, and would escape all payment to the rightful owner for the period antecedent to the suit. In this view, it is needless to consider whether the appellant was an encumbrancer, as held in numerous decisions which will be found reviewed

(1) (1893) L. R. 20 I. A. 160; I. L. R. 21 Calc. 142.

(2) (1880) 5 App. Cas. 25.

(3) (1894) App. Cas. 313.

(4) (1874) 14 B. L. R. 386; 23 W. R. 99 P.C.

(5) (1910) I. L. R. 37 Calc. 559; 11 C. L. J. 503.

(6) (1913) 17 C. W. N. 984.

in *Kalikanand v. Bipradas* (1); *Isan Chundra v. Safatullah* (L. P. 49 of 1920 decided by Mookerjee and Panton JJ. on the 18th August, 1921); *Prasanna v. Jnanendra* (2), and *Debi v. Rajbans* (3), or became a co-proprietor of the defaulting estate, as indicated in *Kalanand v. Sarafat* (4); *Rahimuddi v. Nalini* (5); *Baikuntha v. Basanta* (6); *Aftar Ali v. Brojendra* (7); *Jitendra v. Mohendra* (8), and *Mohim v. Pyari Lal* (9). In either view, the essential fact remains that as occupier without title and without payment of rent, the appellant was bound to surrender possession of the disputed lands to the revenue sale purchaser when the sale was confirmed on the 15th March, 1891. From that date onward, he must be deemed to have unlawfully kept the purchaser out of possession. Consequently, he has no shadow of a grievance when he is called upon to pay mesne profits from the 23rd December, 1899, which enables him to escape reimbursement of profits for more than eight years, which in justice belonged to the purchaser but which he has managed to appropriate and retain. In our judgment, the second ground cannot be sustained on any conceivable principle either of law or of justice, equity, and good conscience, and must consequently be overruled.

As regards the third ground, the appellant has argued that the decree-holder can be allowed mesne profits only up to the expiry of three years from the date of the decree made by the Subordinate Judge on the 27th March, 1905. Section 211 of the Civil Procedure Code of 1882 which was in force when the decree in this suit was made, was in the following terms: "When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs) with interest thereupon at such rate as the Court thinks fit." The respondent contends that the term "decree" signifies the ultimate decree which alone has operative force and is capable of execution. This argument is supported by the decision of the

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra.

Mookerjee, J.

(1) (1914) 21 C. L. J. 265.

(2) (1915)-1. L. R. 43 Calc. 779.

(3) (1918) Pat. C. W. N. 134.

(4) (1908) 12 C. W. N. 528.

(5) (1909) 13 C. W. N. 407.

(6) (1915) 23 C. L. J. 151.

(7) (1915) 24 C. L. J. 60.

(8) (1914) 24 C. L. J. 62.

(9) (1916) 25 C. L. J. 99.

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra.

Mookerjee, J.

Patna High Court in *Nandakumar v. Bilasram* (1), which is precisely in point and accords with the decision of this Court in *Trailokyā v. Jogendra* (2). In that case, the decree of the primary Court was made on the 28th November, 1905, and allowed recovery of possession with mesne profits from the date of the decree to the date of recovery of possession. This decree was confirmed by the High Court on appeal on the 14th May, 1907, and an appeal therefrom to His Majesty in Council was dismissed by the Judicial Committee on the 7th March, 1913. It was ruled by the Patna High Court that the only decree capable of execution was the Order in Council and that mesne profits should be allowed up to the expiration of three years from the date of such order. In support of this position, reliance was placed upon the decision of the Judicial Committee in *Blup Indar v. Bijai Bahadur* (3), which shows that for the purpose of interpreting section 211 of the Code of 1882 or O. 20, R. 12 of the Code of 1908, the term "decree" in such circumstances must be taken to mean the decree made by the Privy Council. We may usefully recall here the lucid exposition given by Mr. Justice Dwarkanath Mitter in *Ram Charan v. Lakhi Kant* (4) of the true effect of the disposal of an appeal upon the decree of the primary Court: "If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously." This is in accord with the view expounded by Scotland, C. J. in *Arunachalla v. Velu Dayan* (5), and was subsequently adopted by the majority of the Full Bench in *Muhammad Sulaiman v. Muhammad Yar* (6), where the observations of the Judicial Committee in *Kristo Kinkur v. Buroda Kanta* (7) were explained. This principle has been repeatedly approved, and illustrations of its application will be found in *Luchmun v. Kishun* (8), which was decided by a Full Bench of this Court and followed the decision of the Judicial Committee in *Pitts v. Lafontaine* (9); *Muhammad*

(1) (1917) 3 Pat L. J. 116; (1917) Pat. C. W. N. 377.

(2) (1908) I. L. R. 35 Calc. 1017 (1013).

(3) (1900) L. R. 27 I. A. 203; I. L. R. 23 All. 152.

(4) (1871) 7 B. L. R. 704 F. B.; 16 W. R. 1 F. B.

(5) (1870) 5 Mad. H. C. R. 215.

(6) (1888) I. L. R. 11 All. 267 F. B.

(7) (1872) 14 M. I. A. 465.

(8) (1882) I. L. R. 8 Calc. 218.

(9) (1880) 6 App. Cas. 482.



*Sulaiman v. Muhammad Yar Khan* (1), and *Muhammad Sulaiman v. Fatima* (2), which were decided by two Full Benches of the Allahabad High Court, and *Rameswar v. Bhaba Sundari* (3); *Aghore v. Mahomed* (4); *Brijlal v. Mahadeo* (5); *Gajraj v. Swami Nath* (6); *Kailash v. Girija* (7), and *Chandra Kant v. Lakshman* (8), which review many of the earlier decisions on the subject and show that the doctrine is supported by the judgment of the Judicial Committee in *Brij v. Tejbal* (9). The decisions of the Judicial Committee in *Batuk Nath v. Munni* (10), and *Abdul v. Jawahir* (11), are clearly distinguishable, as based on a recognition of the principle that dismissal of an appeal for default is not an affirmance of the decree; to the same class belong the decisions in *Patloji v. Ganu* (12); *Bhola Nath v. Kanti* (13); *Kailash v. Girija* (7); and *Shyam v. Satinath* (14). These decisions do not militate against or weaken the effect of the two decisions of the Judicial Committee in *Krishna Kinkur v. Buroda Caunt* (15), and *Brij v. Tejbal* (9). The decisions in *Kartick Chandra v. Nilmani* (16); *Hukum Chand v. Pirthichand* (17), *S. C. Juscurn v. Pirthichand* (18), *Bejoy Chand Mahtab v. Tinkari* (19) do not affect the position as they are authorities only for the elementary proposition that an appeal does not suspend the operation of a decree: *Venkayya v. Sathiraju* (20). Nor can assistance be derived from another class of cases which were pressed upon our attention and which deal with a question of some nicety, namely, when a decree of the primary Court fixes a date for the performance of an act directed thereby, how far the dismissal of an appeal preferred against that decree may be taken to extend by implication the period prescribed. Upon this matter, there has been some divergence of Judicial opinion. The case of *Satwaji v. Sakharlal* (21), which followed the decision of the Judicial Committee in *Bhup*

CIVIL.

1921.

Raja Sashikanta

v.  
Raja Sarat Chandra.

Mookerjee, J.

(1) (1883) I. L. R. 11 All. 267 F. B.

(2) (1889) I. L. R. 11 All. 314.

(3) (1903) 11 C. L. J. 81.

(4) (1909) 11 C. L. J. 155.

(5) (1911) 15 C. L. J. 432.

(6) (1916) I. L. R. 39 All. 13.

(7) (1912) I. L. R. 39 Calc. 925.

(8) (1916) 24 C. L. J. 517; 21 C. W. N. 430.

(9) (1910) L. R. 37 I. A. 70; I. L. R. 32 All. 295; 11 C. L. J. 560.

(10) (1914) L. R. 41 I. A. 104; I. L. R. 36 All. 284; 19 C. L. J. 574.

(11) (1914) I. L. R. 36 All. 350 P. C.; 19 C. L. J. 626.

(12) (1890) I. L. R. 15 Bom. 370.

(13) (1897) I. L. R. 25 Calc. 311.

(14) (1916) I. L. R. 44 Calc. 954.

(15) (1872) 14 M. I. A. 465.

(16) (1916) 20 C. W. N. 686.

(17) (1918) 23 C. W. N. 721.

(18) I. L. R. 46 Calc. 670.

(19) (1920) 24 C. W. N. 617.

(20) (1921) I. L. R. 44 Mad. 714.

(21) (1914) I. L. R. 39 Bom. 175.

CIVIL.

1881.

Raja Sashikanta  
v.  
Raja Sarat Chandra.  
Mookerjee, J.

*Indur v. Bijai Bahadur* (1), supports the view that the time prescribed by the decree of the primary Court is extended by implication upon the dismissal of the appeal. To this category belong the cases of *Noor Ali v. Koni Meah* (2); *Thamal v. Abhoyessuri* (3); *Rup Chand v. Shamshul Jehan* (4); *Daulat v. Bhukandas* (5); *Nanchand v. Vithu* (6); *Sakhhalchand v. Velchand* (7). On the other hand, the cases of *Ramswami v. Sundara* (8); *Ghanshyam Lal v. Ram Narain* (9); *Bhola Nath v. Kanti* (10); *Gopala v. Sannasi* (11); *Fajjuddi v. Asimuddi* (12) and *Tara Chand v. Brojo Gopal* (13), maintain the opinion that the period of performance prescribed by the decree of primary Court remains unaffected by the dismissal of the appeal. The balance of judicial opinion, as the later authorities stand, is in favour of the view that when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. We need not for the purpose of the present case, discuss whether the decisions which take the contrary view may be defended on principle. It has been maintained, however, on behalf of the appellant that the result of the decision of the Judicial Committee in the case of *Girishchunder v. Shos'hi Shikhareswar* (14), lends some support to his contention. We have carefully examined the judgment delivered by Lord Hobhouse in the case mentioned, and we are of opinion that there is nothing in the actual decision of the Judicial Committee which throws light upon the solution of the question raised before us. But our attention has been drawn to the subsequent proceedings reported in *Girish Chander v. Sasi Sekhahreswar* (15). It appears that the decree of the trial Court in the suit was made on the 22nd December, 1883 and the decree of the High Court on appeal therefrom was made on the 28th May, 1885. A portion of the decretal lands was recovered in execution in 1885; the remainder (called Nadiayar) was not recovered till 1891. The Subordinate Judge allowed mesne profits up to the date of recovery of possession. The High Court allowed

(1) (1900) L. R. 27 I. A. 209; I. L. R. 23. All. 152.

(2) (1886) I. L. R. 13 Cal. 13.

(4) 1889) I. L. R. 11 All. 346.

(6) (1894) I. L. R. 19 Bom. 258.

(8) (1907) I. L. R. 31 Mad. 28.

(10) (1897) I. L. R. 25 Calc. 311.

(12) (1907) 11 C. W. N. 679.

(14) (1900) I. L. R. 27 Cal. 951.

(3) (1909) 13 C. W. N. 1060.

(5) (1886) I. L. R. 11 Bom. 172.

(7) (1893) I. L. R. 18 Bom. 203.

(9) 1909) I. L. R. 31 All. 379.

(11) (1915) 19 Mad. L. T. 137.

(13) (1912) 17 C. L. J. 120.

(15) (1905) I. L. R. 23 Calc. 329.

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra.

Mookerjee, J.

mesne profits for three years from the date of the decree of the trial Court. This does not help the contention of appellant in the present case; as possession of some of the properties had been delivered in 1885, it was immaterial whether in respect of those properties, the period of three years was calculated from the decree of the primary Court or the decree of the High Court, because no mesne profits could be allowed after delivery of possession. On the other hand, in respect of Nadiyar it would be material whether the period of three years should be taken to commence from the decree of the first Court or the decree of the High Court. The point, however, was not argued either before the High Court or before the Judicial Committee in the form now presented to us. Indeed, it was assumed that there were only two possible alternatives, namely, that mesne profits should be allowed, for three years from the date of the decree of the first Court, or up to date of actual delivery of possession. The possible bearing of the decree made by the High Court was not considered and there was no judicial pronouncement upon that aspect of the matter. It is manifest that when the question is examined on principle, the only solution acceptable is that the period of three years should be calculated from the date of the ultimate decree which is the only decree capable of and brought into execution. Assume that the primary Court dismisses the suit; the High Court confirms this decree; the Judicial Committee reverses these concurrent decisions and decrees the suit; clearly the time must run from the date of the decree of the Privy Council. Assume again that the primary Court decrees the suit; the High Court reverses the decision; the Judicial Committee restores the decree of the trial Court; the time must plainly run from the date of the decree of the Privy Council as ruled by the Judicial Committee in *Bhup Indar v. Bijai Bahadur* (1). Finally, assume that the trial Court decrees the suit; the High Court affirms that decree and the Judicial Committee affirms the decree of the High Court; it is difficult to appreciate why the time should not run from the date of the decree of the Privy Council, as in the two previous instances. The common principle which governs all the cases is that the time runs from the date of the ultimate decree, which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties. To assign to the term "decree" in section 211 of the Code of 1882 or in O. 21, R. 12 of the Code of 1908, different significations to suit different combinations of events would be legislation and not interpretation. We do not appreciate how the appellant can, with

(1) (1900) L. R. 27 I. A. 202; 1 L. R. 23 All. 152.

## CIVIL.

1921.

Raja Sasbikanta

v.

Raja Sarat Chandra.

Mookerjee, J.

semblance of justice, make a grievance of the result of this view. He might have, if he had so chosen, accepted the decision of the primary Court and surrendered possession of the disputed lands to the plaintiff; he might have, indeed, so delivered possession to the successful claimant, even if he decided to take the judgment of a superior tribunal on the matters in controversy. Instead of this, he retained possession and continued to enjoy the profits of the land, while, though defeated at every stage, he fought his opponent strenuously to the highest judicial tribunal in the empire. He did not, after his defeat in the ultimate Court of appeal, willingly deliver possession to the successful litigant, for, as will presently appear, even in execution proceedings, he raised an objection as to the identity of the lands, which finally proved unsustainable. No laches can be imputed to the decree-holder. The order in Council was made on the 10th August, 1914. The application for delivery of possession and assessment of mesne profits was made on the 13th December, 1915. Notwithstanding objection in the execution proceedings, he obtained delivery, as to some of the lands, on the 1st April, 1917, and as to the remainder, on the 21st August, 1918. There is no reason why the provisions of the law should, in such circumstances, be strained in favour of the judgment-debtor so as to enable him to evade restitution of profits which he has appropriated. We hold accordingly that the view adopted by this Court in *Trailokya v. Jogendra* (1), by the Patna High Court in *Nandkumar v. Bilas Ram* (2) is well-founded on principle and places a rational construction upon the provisions of section 211 of the Civil Procedure Code of 1882 and O. 21, R. 12 of the Code of 1908. The Subordinate Judge must consequently be taken to have correctly held that the period of three years should be calculated from the date of the order of His Majesty in Council and not from the date of the decree of the trial Court; this applies to all the lands, including the area of 21 Bighas mentioned later. The conclusion follows that the third ground urged by the appellant cannot be sustained and must be overruled.

As regards the fourth ground, the appellant has urged that he relinquished possession to the decree-holder on the 18th November, 1916, and should not accordingly be held liable for mesne profits subsequent to that date. It may be conceded that, as ruled in *Ibbs v. Richardson* (3) in no case can the plaintiff claim mesne profits

(1) (1908) I. L. R. 35 Calc. 1017 (1019)

(2) (1917) 3 Pat. L. J. 116; (1917) Pat. C. W. N. 377.

(3) (1831) 9 A. and E. 849 (853).

for any period subsequent to an offer by the defendant to restore him possession; see also *Ishan Chandra v. Ainuddin* (1); *Abbas v. Fassihuddin* (2); *Malladi v. Brundavanam* (3) and *Shambhu Nath v. Satis Chandra* (4). But the Subordinate Judge has found that there was no genuine offer to restore the plaintiff to possession and no actual withdrawal from occupation by the defendant. The conclusion of the Subordinate Judge is supported by the significant circumstance that after the amin had been directed, on the 14th February, 1916, to deliver possession, the defendant, on the 5th April, 1916 raised objection that the boundary had not been correctly ascertained. This objection was overruled by the Subordinate Judge. The judgment-debtor appealed to this Court, and on the 18th July, 1916, obtained a reversal of the order of the Subordinate Judge. When the matter went back to the lower Court, the judgment-debtor took exception to the delivery of an area of twenty-one bighas. This objection was successful. The decree-holder thereupon appealed to this Court; on the 21st August, 1918, the order of the Subordinate Judge was set aside, and the decree-holder was held entitled to take possession of that area in execution. In these circumstances, it does not seem probable that there was a genuine surrender on the 18th November, 1916. The fourth ground must thus be overruled as untenable.

As regards the fifth ground, the appellant has contended that interest should not have been allowed on mesne profits at the rate of 12 per cent per annum. It has not been disputed that under section 2, clause 12, Civil Procedure Code, the expression "Mesne profits" means those profits which the person in wrongful possession actually received or might with ordinary diligence have received therefrom together with interest on such profits. Consequently, interest should ordinarily be allowed on mesne profits, though, as pointed out by the Judicial Committee in *Girish Chunder v. Shoshi Shikhareswar* (5), inasmuch as the interest forms an integral part of mesne profits, the interest is as much in the discretion of the Court as the mesne profits themselves; *Harmanojee v. Ramprosad* (6). The cases in the books do not seem to disclose a uniform rule as to the rate of interest allowable on mesne profits. Thus, in the case of *Girish Chunder v. Soshi Shikhareswar* (5), interest was allowed at

CIVIL.

1921.

Raja Sashikanta

v.  
Raja Sarat Chandra.

Moekerjee, J.

(1) (1901) 5 C. W. N. 720.

(2) (1897) I. L. R. 24 Calc. 413.

(3) (1911) 2 Mad. W. N. 258.

(4) (1920) 25 C. W. N. 367.

(5) (1900) L. R. 27 I. A. 110; I. L. R. 27 Calc. 951 (969).

(6) (1907) 6 C. L. J. 462 (472).

CIVIL.

1921.

Raja Sashikanta

v.  
Raja Sarat Chandra.

Mookerjee, J.

the rate of 6 per cent, as appears from the report of the subsequent proceedings in *Girish Chunder v. Sasi Shekhareswar* (1). On the other hand, interest appears to have been allowed at the rate of 12 per cent in the cases of *Radharaman v. Surnomoyi* (2), and *Lachmi Narain v. Mazhar Abbas* (3). In the present case, the plaintiff claimed interest on the mesne profits year by year at the rate of one per cent per month. In the written statement, the defendant characterised the claim for mesne profits as untenable and exorbitant. The Subordinate Judge has allowed interest at the rate claimed, but he has not assigned any grounds for his award. It cannot be disputed that whatever may be considered as a fair rate of interest on money since the war, during a considerable portion of the period when the mesne profits decreed in the present case accrued (1899-1917), six per cent per annum was considered the ordinary rate of interest and was allowed on decrees for money made by Courts; *Ijratulla v. Chandra Mohan* (4). We must further bear in mind the distinction which has been recognised between the respective liabilities of *bona fide* and *mala fide* trespassers. Thus, although it has been held that all trespassers, whether *bona fide* or *mala fide*, are liable for mesne profits: *Byjnath v. Badhoo* (5) and *Mugun v. Sirbessur* (6), the *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser: *Altaj Ali v. Lalji Mal* (7); *Dakshina v. Saroda* (8). The same distinction has been recognised in other systems; see *Livingstone v. Rawyards Coal Co.* (9); *Peruvian Guano Co. v. Dreyfus* (10); *Glenwood Lumber Co. v. Philips* (11); *Green v. Biddle* (12). In the present case, the appellant held occupation of a considerable tract of the disputed land under a title which was established in a contested litigation; and although he subsequently overstepped to some extent the boundaries determined therein, he may well be considered a *bona fide* and not a *mala fide* trespasser. We are of opinion that in all the circumstances of the case the interest on the mesne profits should be calculated at six per cent instead of twelve per cent per annum. The fifth ground is accordingly allowed in part.

(1) (1905) I. L. R. 33 Calc. 329.

(2) (1903) I. L. R. 30 Calc. 506.

(3) (1908) I. L. R. 35 Calc. 1000 (1009).

(4) (1907) I. L. R. 34 Calc. 954; 12 C. W. N. 285; 6 C. L. J. 255.

(5) (1868) 10 W. R. 486.

(6) (1867) 8 W. R. 479.

(7) (1877) I. L. R. 1 All. 518.

(8) (1893) L. R. 20 I. A. 160; I. L. R. 21 Calc. 142.

(9) (1880) 5 App. Cas. 25.

(10) (1892) App. Cas. 166.

(11) (1904) App. Cas. 405.

(12) (1823) 8 Wheaton U. 5; 1.

As regards the sixth ground, numerous objections were vigorously urged by both sides against the method of enquiry adopted by the commissioner and approved by the Subordinate Judge for ascertainment of the mesne profits. Indeed, it looked probable at one stage of the arguments that there was no escape from a further enquiry which was likely to be of a protracted character. The parties, however, have come to a settlement on this part of the case. They have agreed that the assessment should be made on the following basis :

| Nature of land | Area       |         |         |
|----------------|------------|---------|---------|
|                | Big.       | Cot.    | Ch.     |
| Doem ...       | 3          | 12      | 12      |
| Dofasli ...    | 2353       | 10      | 8       |
| Soem ....      | 83         | 0       | 0       |
|                | <hr/> 2440 | <hr/> 3 | <hr/> 4 |

The parties have further agreed that 600 bighas out of this area will be assessed at four annas per bigha; the remainder will be assessed at twelve annas per bigha. The amount as determined by the Court below will be altered accordingly.

The result is that the decree made by the Subordinate Judge must be modified in two respects, namely, first, as to the area and rates, and, secondly, as to the interest; subject to variation in these two respects, the decree made by the Subordinate Judge will stand, including the order as to cost of the proceedings in the lower Court and the interest on the total amount awarded. Each party will pay his own costs in this Court. A single self-contained decree will be drawn up in the two appeals after the amount due under this judgment shall have been calculated.

A. T. M.

*Decree modified.*

CIVIL.

1921.

Raja Sashikanta

v.

Raja Sarat Chandra.

*Mooherjee, J.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.

JAGANNATH MARWARI AND OTHERS

CIVIL.

1921.

April 18, 19, 20.  
June, 21.

v.

CHANDNI BIBI AND ANOTHER.\*

*Adverse possession—Unregistered deed of gift, admissibility of—Hindu Law—Direct evidence of adoption, if necessary—Trustee, claiming adversely—Burden of proof—Erection of substantial building, if conclusive evidence of ouster of co-tenant.—Co-tenant's possession, when adverse—Co-tenant's right to possession—Evidence to show co-tenant's adverse possession, nature of—Joint owner effecting in good faith valuable improvements in joint property—His remedy.*

An unregistered deed of gift executed in 1882, of an immovable property of value exceeding Rs. 100, though could not, under section 49 of the Indian Registration Act of 1877, affect any immovable property comprised therein or be received as evidence of any transaction affecting such property, is admissible in evidence for a collateral purpose : *Lalla Gopee v. Liaht* (1) and other cases.

Delivery of possession given under such deed validates under the Hindu Law then in force the intended gift. *Kalidas v. Kanaiyaha Lal* (2) and other cases.

It is not necessary to produce direct evidence of the fact of adoption ; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist : *Rajendro v. Jogen-dro* (3) and other cases.

The burden lies upon the trustee to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner.

The erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster : *Dwijendra v. Purnendu* (4).

To establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others ; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive.

If possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former : *Corea v. Appuhami* (5).

\* Appeal from Original Decree No. 16 of 1910, against the decree of Babu Bijoy Gopal Chatterjee, Subordinate Judge of Asansol, dated the 17th December, 1919.

(1) (1876) 25 W. R. 211.

(2) (1884) L. R. 11 I. A. 218 ; I. L. R. 11 Calc. 121.

(3) (1871) 14 M. I. A. 67 ; 7 B. L. R. 216 ; 15 W. R. P. C. 39.

(4) (1910) 11 C. L. J. 189

(5) (1912) App. Cas. 230 (237).



Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them.

One co-tenant may oust the others and set up an exclusive right of ownership in himself, and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenants does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse.

In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights.

No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. Acts, which might properly be held to show adverse possession as between strangers, do not necessarily have such effect as between tenants in common; acts of ownership by one co-tenant may not in themselves amount to the disseizin of the other co-tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. The overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants.

A co-sharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence. Hence it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But if no notice is given to the co-sharer, of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse, as to justify the inference of knowledge on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his rights.

CIVIL.

1921.

Jagannath  
v.  
Chandni Bih.

CIVIL.

1921.

Jagannath

Chandni Bibi.

If a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of his property.

Appeal by the Defendants.

Suit for possession,

The material facts appear from the judgment of Mookerjee, J.

*Babus Dwarka Nath Chuckerbutty and Jyoti Chandra Sarkar* for the Appellants.

*Sir Asutosh Chaudhuri, Babus Bankim Chandra Mookerjee and Rama Prosad Mookerjee* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

**Mookerjee, J.**—The subject matter of the litigation which has resulted in this appeal consists of two parcels of land situated in the town of Raniganj. The plaintiffs claim an one-fourth share of a leasehold interest in the land created by the Bengal Coal Company, the admitted landlords. The contesting defendants deny the alleged title of the plaintiffs and claim an independent right in themselves in the entire property. The Subordinate Judge has found in favour of the plaintiffs on the question of title; he has also held that such title was in subsistence at the date of the commencement of the suit and had not been extinguished by adverse possession on the part of the defendants. In this view, the trial Court has made a decree for possession upon declaration of title and has further directed partition by metes and bounds. On the present appeal, the decree of the Subordinate Judge has been assailed substantially on two grounds, namely, first, that the plaintiffs have failed to prove the existence at any time of the specific title set up by them; and, secondly, that even if the plaintiffs had such title at some remote period of time, it had been extinguished long before the date of the suit by adverse possession on the part of the defendants. For the determination of the questions in controversy which are closely connected and may be conveniently discussed together, a brief recital of the history of the devolution of the title to the disputed property is essential.

On the 14th August, 1855, the Bengal Coal Company granted a permanent building lease in respect of two plots of land in the town of Raniganj, at an annual rent of Rs. 24, to one Ram Singh Chaudhuri. There was some controversy in the Court below upon the question, whether the two plots covered by this lease are iden-

June, 21

tical with the two parcels now in dispute. The schedule attached to the lease sets out the boundaries of the two plots, but, as might have been anticipated, the Subordinate Judge found it difficult to identify all the boundaries after the lapse of sixty years; there can, however, be little room for reasonable doubt as to the identity of the land. Rām Singh Chaudhuri continued in possession upon payment of rent to the Bengal Coal Co. till 1864 when he transferred his leasehold interest to Mangalchand Baldeodas, who took a half share, Jainarain, who took an one-fourth share, and Panna Lal, who took the remaining one-fourth share. These persons continued in occupation, upon payment of rent to the superior landlords at the rate of Rs. 24 annually for at least a quarter of a century. As there is no indication whatever that they held other lands under the Bengal Coal Co. at the same rate, the Subordinate Judge has, in our opinion, correctly held, notwithstanding the difficulty in the identification of boundaries, that the land now in dispute is precisely the same land as is covered by the lease of the 14th August, 1855 granted by the Company.

We have next to consider the history of the share of Panna Lal which forms the subject matter of this litigation. The relationship of the members of his family is set out in the following genealogical table.

Panna Lal

Died 1892

Surajmal

Died during life  
time of Panna Lal

Widow

Lachmi Bibi

Def. 19

Mahadeo

(adopted son)

died 12. 9. 1896

Widow

Chandni Bibi

Plff. 1.

Ramnibas

(adopted 1892)

Plff. 2

The evidence leaves no room for doubt that Mangalchand Baldeodas, Jainarain and Panna Lal were jointly in enjoyment of the leasehold property from 1865 till 1882. In the latter year, Panna Lal who had lost his son Surajmal and had taken Mahadeo in adoption, retired to Benares. With a view to make provision for the maintenance of his widowed daughter-in-law, Lachmi Bibi, he executed on the 25th June, 1882, a deed of gift whereby he gave her a life

CIVIL

1921.

Jagannath

v.

Chandni Bibi.

Mookerjee, J.

CIVIL.

1921.

Jagannath

v.

Chandni Bibi.

Mookerjee, J.

interest in his share of the disputed property; he further directed that his adopted son Mahadeo would become full owner upon the death of Lachmi Bibi. The document was not registered, though it transferred interest in immovable property of value exceeding Rs. 100. The transaction took place, it will be observed, shortly before the Transfer of Property Act came into force on the first July, 1882, and was consequently not affected by the operation of section 123 which provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. The deed of gift was, however, compulsorily registrable under section 17 of the Indian Registration Act, 1877, and, consequently could not, under section 49 affect any immovable property comprised therein or be received as evidence of any transaction affecting such property. It was however admissible in evidence for a collateral purpose, namely, to explain the reason why Lachmi Bibi received the income as if she were a joint owner in possession of the property; *Lalla Gopee Chand v. Liakut Hosssein* (1); *Thakore v. Bamniji* (2); *Venkatachari v. Rangasam* (3); *Varada v. Jeevaratnammal* (4). It may also be added that if there had been evidence of delivery of possession, the intended gift might have been validated under the Hindu Law which was then in force: *Kalidas v. Kanaiyaha Lal* (5); *Dharmodas v. Nistarini* (6); *Lakshimoni v. Nittyananda* (7); *Ram-Chandra v. Ranjit* (8). The true position then was that the intended gift by Panna Lal in favour of his widowed daughter-in-law Lachmi Bibi did not take effect in law. But the evidence makes it abundantly clear that the first defendant Jagannath (the son of Mangalchand), who managed the property on behalf of the joint owners, regularly paid to Lachmi Bibi the surplus income in the one-fourth share of Pannalal. This continued unquestionably during the life time of Pannalal who died, as we have seen, in 1892. It is, we think, also indisputable that as the Subordinate Judge finds, Lachmi Bibi continued to receive the income also during the life time of Mahadeo who might before his death on the 12th September, 1896 have repudiated the unregistered deed of gift; but there is no indication that he took such a step; on the other hand, he apparently acquiesced in the

(1) (1876) 25 W. R. 211.

(2) (1903) I. L. R. 27 Bom. 515.

(3) (1909) 6 Mad. L. T. 192.

(4) (1919) L. R. 46 I. A. 285; I. L. R. 43 Mad. 244.

(5) (1884) L. R. 11 I. A. 218; I. L. R. 11 Calc. 121.

(6) (1887) I. L. R. 14 Calc. 446.

(7) (1892) I. L. R. 20 Calc. 464.

(8) (1899) I. L. R. 27 Calc. 242 (249).

arrangement which his father had made for the maintenance of his sister-in-law. In this connection, we may add that the Subordinate Judge had before him ample materials to justify the conclusion that Mahadeo had been duly adopted by Pannalal and that Ramnibas had in his turn been validly adopted by Mahadeo. As has been repeatedly ruled, it is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist; *Rajendro Nath v. Jogendro Nath* (1); *Achalram v. Kasim Hossain* (2); *Rupnarain v. Gopal* (3); *Sabo v. Nuboghuji* (4); *Huri Dyal v. Roy Krishito* (5) *Vyas v. Vyas* (6). The Subordinate Judge has further found that Lachmi Bibi continued to receive from Jagannath one-fourth share of the surplus income for several years after the death of Mahadeo, down to 1901. He has, however, held that there is no satisfactory proof that thereafter Lachmi Bibi received the income; but under what circumstances, payment came to be discontinued has not been explained by Jagannath, who is the first defendant in this suit. We next find that disputes broke out between Lachmi Bibi and Chandni Bibi, that is the widows of Surajmal and Mahadeo, and the daughters-in-law of Pannalal. Matters in difference were referred to arbitration on the 14th July, 1909, and the arbitrators made their award on the 12th June, 1912. The substance of the award was that Chandni Bibi and Ramnibas would pay to Lachmi Bibi for her life Rs. 12 per month, and Lachmi Bibi would, for a consideration of Rs. 1000., release whatever right or claim she might have to the Raniganj property under the deed of gift of the 25th June, 1882. This award was confirmed and embodied in a formal memorandum, which was executed by all parties concerned on the 31st March, 1913, and was registered on the following day. The present suit was then instituted on the 13th October, 1917, by Chandni Bibi and Ramnibas against the representatives of Mangalchand, Baldeodas and Jainarain, the three co-sharers of Pannalal. Upon the question of title, there can, in our opinion, be no vestige of doubt that the

CIVIL  
JAGANNATH  
CHANDNI BIBI  
MOOKERJEE, J.

(1) (1871) 14 M. L. A. 67; 7 B. L. R. 216; 15 W. R. P. C. 39.

(2) (1904-5) L. R. 32 I. A. 113 (121); 1 L. R. 27 All. 271.

(3) (1909) L. R. 36 I. A. 103; 1 L. R. 36 Calc. 780; 10 C. L. J. 58.

(4) (1869) 11 W. R. 380.

(5) (1875) 24 W. R. 107.

(6) (1899) 1 L. R. 24 Bom. 473.

CIVIL.

1921.

Jagannath

v.

Chandni Bibi.

M. K. J.

claim is well-founded. The only question which requires consideration is, whether the title of the plaintiffs as joint-owners with the contesting defendants had been extinguished by adverse possession on their part for the statutory period before commencement of the suit. The Subordinate Judge has pronounced in favour of the plaintiffs, and after careful examination of the evidence, we have arrived at the conclusion that his view is correct.

It is plain that Pannalal was originally a joint owner of the disputed property along with his three co-sharers, the predecessors of the defendants. Even before his retirement to Benares, he did not usually reside at Raniganj. From 1865 to 1882 the property was looked after by Baldeodas, one of the co-sharers, from whom Pannalal regularly received his proportionate share of the surplus income, after payment of rent to the superior landlord, the cost of repairs and other incidental charges. The evidence establishes clearly that there was great intimacy between Pannalal, Baldeodas, Mangalchand, and his son Jagannath, the first defendant, and that the wives of Pannalal and Mangalchand treated each other as if they were sisters. The management by Baldeodas during this period was plainly on behalf and for the benefit of all the joint owners, and Pannalal must be deemed to have been in possession. At the end of the period just mentioned, Pannalal retired to Benares. At that time, his family consisted of his wife, his widowed daughter-in-law Lachmi Bibi, and his adopted son Mahadeo. He was naturally anxious to make suitable provision for Lachmi Bibi, and on the 25th June, 1882, he executed in her favour the deed of gift under which she was to take a life interest in his share of the Raniganj property and Mahadeo was to take a vested remainder. The deed was neither registered nor accompanied by delivery of possession, with the consequence that it did not take effect in law. But it has been proved beyond doubt that the parties acted on the assumption that a valid gift had been made. Pannalal, at the time of his retirement to Benares, requested the first defendant Jagannath, the son of his intimate friend Mangalchand, to look after the property, to realise rent from the tenants, to make necessary repairs, to pay rent to the superior landlord and then to give Lachmi Bibi her proportionate share of the profits. Jagannath appears to have faithfully carried out the trust reposed on him and to have regularly paid to Lachmi Bibi her dues down to 1901. Here it may be stated that down to 1890, the property had stood in the books of the landlord in the names of the four persons who had got themselves substituted on their purchase from the original tenant Ramsingh Chaudhuri. But

in 1891, Jagannath managed to have the names of Pannalal and Jaynarain removed from the books of the landlord. It seems probable that this was done in pursuance of a design to appropriate the entire property on a convenient opportunity. But even if he did entertain such a dishonest purpose at the time, he did not venture to carry it into immediate execution and continued to pay the surplus profits to Lachmi Bibi down to 1901. The Subordinate Judge has held that the evidence of payment during the period subsequent to 1901 is not reliable. It is a matter for comment that the account books produced by Jagannath for this period could not be scrutinised in the trial Court, as they were written in the peculiar script used by marwari merchants. We are thus left with the finding of the Subordinate Judge that receipt of surplus income by Lachmi Bibi has not been proved for the period subsequent to 1901. On these facts, the contesting defendants have argued that the title of the plaintiffs has been extinguished by adverse possession for the statutory period. We are of opinion that this contention is not well-founded. The evidence clearly establishes that Jagannath was not only a joint owner, but that he undertook to look after the share of Pannalal at his express request. The burden lies upon him to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. He has not ventured upon an explanation of his conduct; on the other hand, he has repudiated the title set up by the plaintiffs as altogether unfounded and has falsely denied that he had ever paid a proportionate share of the usufruct to Lachmi Bibi as claiming title through Pannalal. The two circumstances relied upon by the defendants in proof of assertion of hostile title to the knowledge of the rightful owner are by no means conclusive. The fact that a substantial building has been erected on one of the plots by the defendants is clearly not conclusive proof of ouster. As was pointed out in *Dwijendra Narain v. Purnendu Narain* (1) the erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster, and this accords with the view indicated in *Anand v. Parbati* (2), and *Upendra v. Umes* (3). The fact that the surplus profits, if any, have not been received by Lachmi Bibi since 1901 is equally inconclusive, in view of principles settled beyond controversy by recent decisions of

CIVIL.  
 1921.  
 Jagannath  
 v.  
 Chandni Bibi.  
 Mookerjee, J.

(1) (1910) 11 C. L. J. 189.

(2) (1906) 4 C. L. J. 198.

(3) (1910) 12 C. L. J. 25.

Civil.  
1921.  
Jagannath  
v.  
Chandni Bibi.  
Mookerjee, J.

the Judicial Committee: *Corea v. Appukhami* (1); *Muttu v. Brito* (2); *Hardit v. Gurimukh* (3); and *Varada v. Jeevarathnammal* (4). Reference may also be made in this connection to the observations of Lord Denman in *Culley v. Taylerson* (5), which were quoted with approval in the judgment of the Judicial Committee in the case last mentioned:

"Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant tenant in common, has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the Jury to take into consideration whether they will presume that there has been an ouster; as to which see the cases of *Deo Dem Fisher v. Prosser* (6); *Deo Dem Hollings v. Birds* (7), and *Deo Dem White v. Cuff* (8)."

Among the cases in this Court, reference may be made to the decisions in *Jogendra Nath Rai v. Baladeo Das* (9); *Ayenemussa Bibi v. Sheikh Isuf* (10); *Lokenath Singh v. Dhakeswar Prosad Narayan Singh* (11); *Narendra Bhusan Roy v. Jogendra Nath Roy* (12); *Balaram v. Syama Charan* (13).

The fundamental rule is that in order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others; mere nonparticipation in the profits by one party and exclusive occupation by the other is not conclusive. Apart from this, we have the important circumstance that in this case the rightful owner, the second plaintiff Ramnibas, who, when a child few months old, was taken in adoption in 1892, was a minor till at least 1910; it is thus difficult to appreciate how the contesting defendants began to hold adversely to the knowledge of the

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|------------------------------------------------------|---------------------------|
| (1) (1912) App. Cas. 230.                            | (2) (1918) App. Cas. 895. |
| (3) (1918) 28 C. L. J. 437.                          |                           |
| (4) (1919) L. R. 46 I. A. 285; I. L. R. 43 Mad. 244. |                           |
| (5) (1840) 11 A. & E. 1008 (1014).                   | (6) (1774) 1 Cowp. 211.   |
| (7) (1809) 11 East. 49.                              |                           |
| (8) (1808) 1 Camp. 173.                              |                           |
| (9) (1907) I. L. R. 35 Calc. 961; 6 C. L. J. 735.    |                           |
| (10) (1912) 16 C. W. N. 849.                         |                           |
| (11) (1914) 21 C. L. J. 253; 20 C. W. N. 51.         |                           |
| (12) (1916) 20 C. W. N. 1258.                        |                           |
| (13) (1920) 33 C. L. J. 344; 24 C. W. N. 1057.       |                           |



infant in 1901. Indeed before this action was brought, there was no attempt on the part of the defendants to rely on adverse possession; their pretence was that they were the rightful owners, and one of them, the first defendant, has pledged his oath in support of that untrue allegation in the witness box in this suit; they cannot consistently urge that from 1901 the first defendant began to hold adversely to the knowledge of the rightful owner. See the observations of Lord Macnaghten in *Corea v. Appuhami* (1). Reliance may further be placed on the judgments of Lord Buckmaster in *Hardit v. Gurmukh* (2), of Lord Dunedin in *Muttu Nayagam v. Prito* (3), and of Viscount Cave in *Varada v. Jivaratnammal* (4); which emphasise the principle that if possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former, or, in the language of Wood, V. C. in *Thomas v. Thomas* (5), possession is never considered adverse, if it can be referred to a lawful title. Reference may also be made to the decision of this Court in *Lokenath v. Dhakeswar* (6), where the cases on the subject were reviewed and the doctrine deducible therefrom formulated. Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them. It cannot be questioned, however, that one co-tenant may oust the others and set up an exclusive right of ownership in himself; and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenants, does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of

CIVIL.

1921.

Jagannath

v.

Chandni Bibi

Mookerjee, J.

(1) (1912) App. Cas. 230 (237).

(2) (1918) 28 C. L. J. 437.

(3) (1918) App. Cas. 895.

(4) (1919) L. R. 46 I. A. 285 I.; L. R. 43 Mad. 244.

(5) (1855) 2 K. and J. 79 (83).

(6) (1914) 21 C. L. J. 253; 20 C. W. N. 51.

CIVIL.

1921.

Jagannath

v.  
Chandni Bibi.

Mookerjee, J.

one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants. No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. It is indisputable that acts, which might properly be held to show adverse possession as between strangers, do not necessarily have such effect as between tenants in common; acts of ownership by one co-tenant may not in themselves amount to the disseisin of the other co-tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. From this point of view, it has been maintained that sole possession by a co-tenant becomes adverse to his fellow-tenants by his repudiation or disavowal of the relation of co-tenancy between them; and any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon enquiry, amounts to an ouster of the co-tenants; but what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants. Tested in the light of these principles, the contention of the defendants must be deemed

unsubstantial. In 1882, the first defendant undertook, at the request of his co-sharer Pannalal when he left for Benares, to manage his share of the property, and carried out his obligations for a period of twenty years. He has never explained why, when, and how he cast off his character as co-sharer-manager and asserted a hostile title in himself to the knowledge of the rightful owner. If he renounced the trust in 1901, he is met by the difficulty that the rightful owner at the time was an infant who continued to be a minor for at least nine years thereafter. He may be pertinently asked, when did his repudiation take place, when was his hostile intent manifested by such overt and notorious acts of an unequivocal character, to the denial and exclusion of the right of his co-sharer, as could not be misunderstood by the latter? It may be conceded that a co-sharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence. For this reason, it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But if no notice is given to the co-sharer, of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse, as to justify the inference of knowledge on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his rights. Tested from the point of view thus indicated, the defence of adverse possession for the statutory period to the knowledge of the rightful owner cannot possibly be deemed to have been established in this case and it has been rightly negatived by the Subordinate Judge.

We may add finally that much stress was laid by the appellants on the fact that they have built a costly structure on the parcel known as the marwaripati property. This, however, does not create any real difficulty. The Subordinate Judge has not overlooked the equitable considerations which have been held applicable in such circumstances, as was explained in the cases of *Upendra v. Umes* (1); *Narayan v. Chulhan* (2), where the rule recognised in *Leigh v. Dickeson* (3), and *Brickwood v. Young* (4) was applied. In such cases, if a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor,

CIVIL.  
 1901  
 Jagannath  
 v.  
 Chandni Bibi.  
 Mookerjee, J.

(1) (1910) 12 C. L. J. 25.

(2) (1911) 15 C. L. J. 376.

(3) (1884) 15 Q. B. D. 60.

(4) (1905) 2 Com. L. R. 387.

CIVIL.

1921.

Jagannath

Chandni Bibi

Mookerjee, J.

in addition to his reateable share of his property. The Subordinate Judge has given directions in this behalf which will adequately protect the defendants when the partition is actually effected.

The result is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs.

**Buckland J.**—I agree and have nothing to add.

A. T. M.

*Appeal dismissed.*

*Before Sir. Autosh Mookerjee, Knight, Judge, and Mr. Justice Buckland.*

CIVIL.

1921.

May. 5, 6.

June, 21.

BIBI JINJIRA KHATUN AND OTHERS

v.

MAHOMED FAKIRULLA MEA AND OTHERS.\*

*Wakf—Hanafi law—Wakf Validating Act (VI of 1913), Sec. 3 (b)—Payment of debts out of rents and profits of Wakf property—Mortgage, existence of, at the date of wakf—Valid wakf, how created—Intention to create—Settlor appointing himself mutwalli—Delivery, formal, of possession, if necessary—Mars-ul-maut—Death-illness, existence of—Question of fact—Health of settlor, state of, at the date of wakf—Direct evidence not available—Antecedent and subsequent conditions of settlor—Statements in the report of the Commissioner and in the certificate given by Kabiraj, admissibility of.*

Under section 3 (b) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a wakf for the payment of his debts out of the rents and profits of the property dedicated.

The existence of a mortgage at the time of creation of the endowment, does not render the endowment invalid under the Mahomedan law: *Shahasadee Hasara v. Khaja Hussein* (1).

Under Hanafi law, a valid wakf is created by declaration of endowment by the owner and delivery of possession is not essential: *Doe dem Faww Beebe v. Abdollah* (2), Appointment of a mutwalli is not essential to the validity of a wakf: *Ramsan v. Zakur* (3).

\*Appeal from Original Decree No. 199 of 1918, against the decree of Babu Hem Kumar Neogi, Subordinate Judge of Rajshahi, dated the 26th March, 1918.

(1) (1869) 12 W. R. 498; 4 B. L. R. A. C. 86.

(2) (1858) Fulton 345.

(3) (1913) 13 A. C. 246.

A mere intention to set apart property for charitable purposes is not sufficient to create a valid wakf.

Where the settlor appoints himself as a first mutwalli, no formal delivery of possession from himself to himself is necessary even according to Imam Mohamad.

Where the declaration of a wakf is not acted upon by the settlor and its objects are not given effect to, it may be presumed that the wakf was not completed or the settlor had no *bona fide* intention to create a wakf: *Delroos-Bennoo v. Nawab Ashgur* (1); *Zoolaka v. Zynul Abedin* (2).

Gifts made by a Mussalman during *mars-ul-maut* or death-illness cannot take effect beyond a third of the surplus of his estate, after payment of funeral expenses and debts unless the heirs give their consent, after the death of the donor, to the excess taking effect: *Ibrahim v. Saiboo* (3); nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death: *Khajooroonessa v. Rowshan* (4), and *Bafatun v. Bilaity* (5); similarly, a wakf made in death-illness is valid only to the extent of a third of the net estate left by the deceased, unless the heirs consent: *Ali Husain v. Fasal Husain* (6).

A Muslim who is in *mars-ul-maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a wakf in such illness, unless his heirs consent, the wakf will affect only one-third of his estate and will be invalid in respect of the excess; it operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated mutwalli.

In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death, namely, (a) proximate danger of death, so that there is a preponderance of apprehension of death; (b) there must be some degree of subjective apprehension of death in the mind of the sick person, and (c) there must be some external indicia, such as inability to attend to ordinary avocations.

Whether or not a particular illness constitutes *mars-ul-maut* is primarily a question of fact: *Ibrahim v. Saiboo* (3); but it may sometimes be a mixed question of law and fact, as where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *mars-ul-maut* as formulated by Mahomedan jurists.

When direct evidence of the state of health of the settlor on the date of the deed of wakf is not available, the evidence of antecedent and subsequent conditions of the settlor should converge to that point of time.

Where neither the commissioner nor the kabiraj has been examined as a witness, the statements in the report by the commissioner to the Court and in the certificate given by the kabiraj are not admissible in evidence.

(1) (1875) 13 B. L. R. 167.

(2) (1904) 6 Bom. L. R. 1058 (1066).

(3) (1907) L. R. 34 I. A. 167; 1 L. R. 35 Calc. 1 (22); 6 C. L. J. 695.

(4) (1876) L. R. 3 I. A. 291; 1 L. R. 2 Calc. 184.

(5)-(1903) 1 L. R. 30 Calc. 683.

(6) (1914) 1 L. R. 36 All. 431.

CIVIL.

1921.

Bibi Jinjira Khatun

v.

Fakirulla.

CIVIL.

1921.

Bibi Jinjira Khatun

Fakirulla.

Appeal by the Defendants.

Suit for a declaration.

The material facts appear from the judgment of Mookerjee, J.

*Babus Dwarka Nath Chuckerbutty, Bhudar Haldar and Bankim Chandra Mookerjee* for the Appellants.

*Babus Sarat Chandra Ray Chaudhuri, Krishna Kamal Maitra, Satyendra Nath Singha and Indu Bhushan Majumdar* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

June, 21.

**Mookerjee, J.**—This is an appeal by the first two defendants in a suit instituted by the plaintiffs for a declaration that a wakf executed by the late Mahomed Elahi Buksh Sarkar on the 31st January, 1915, is valid, that the first plaintiff is the duly appointed mutwalli thereof and that no title accrued to the seventh defendant under the conveyance executed in his favour by the first six defendants on the 11th April, 1916. The defendants resisted the claim upon every conceivable ground; the chief objections are indicated in the following three issues :

“6. Was Elahi Buksh Sarkar at the date of execution of the wakfnama suffering from death illness? Was he physically and mentally incapable of executing the wakfnama when it is alleged to have been executed? Did Elahi Buksh Sarkar execute the wakfnama, if at all, with his free consent and with that of his heirs?

7. Did Elahi Buksh Sarkar belong to Shafi sect of Mahammadan? If so, is the alleged wakf valid?

8. Is the wakfnama propounded by the plaintiff genuine and legally valid?”

The Subordinate Judge has found in favour of the plaintiffs upon all the points in controversy and has decreed the suit. Upon the present appeal, his decree has been challenged substantially on four grounds, namely, first, that the wakf as is indicated by its terms was illusory and inoperative in law; secondly, that the wakf was invalid because the settlor was at the time heavily involved in debts and the properties dedicated were under mortgage; thirdly, that the wakf was invalid, as possession of the properties dedicated was not transferred to the mutwalli during the life time of the settlor; and fourthly, that the wakf in excess of a third share was invalid, as it was executed when the settlor was suffering from marz-ul-maut or death-illness and without the consent of his heirs.

As regards the first point, it is plain that the legality of the

dedication which, it is not now contested, was in the present case made by a Hanafi Mussalman, must be tested with regard to the provisions of the Mussalman Wakf Validating Act (Act VI of 1913). This Act came into force on the 7th March, 1913, and in sections 3 & 4 provides as follows:

"3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf."

We shall now analyse the provisions of the wakfnama, to show that they do not contravene the requirements formulated by the legislature. The preamble recites that the settlor is a Hanafi Mussalman and that he is anxious to attain salvation, though he also realises the paramount duty of every one to provide for the maintenance and worldly expenses of his own self and family, children and descendants. He accordingly creates the wakf for religious purposes, for the maintenance of his own self and family, children and descendants, and also to prescribe a suitable means for the payment of all his debts. Then follow detailed rules in seven paragraphs. The first paragraph lays down that the settlor shall be mutwalli during his life time and then describes how the office of mutwalli shall be held by his descendants from generation to generation, or in the event of extinction of his line, by suitable persons selected by the District Judge. The second paragraph describes the expenses to be met from the gross collections of the wakf estate. The third paragraph provides that one eighth of the net income is to be spent for specified religious purposes, such as, prayer in mosques,

CIVIL

1921.

Bibi Jinjira Khatun

v.  
Fakirulla.

Mookerjee, J.

CIVIL.

1921.

Bibi Jinjira Khatun

Fakirulla.

Mookerjee, J.

instruction in religion and morals, distribution of alms, feeding of the poor and the like. The fourth paragraph provides that one-fourth of the net income is to be annually devoted for the liquidation of a mortgage debt of Rs. 20,000. After clearance of the debt, the amount is to be regularly applied in the payment of monthly allowances to poor Mussalman students. The fifth paragraph provides that one-half of the net income is to be applied for the payment of maintenance allowances to the descendants of the settlor in specified proportions ; on failure of the person or persons to whom allowances are directed to be paid, their share of the money is to be applied for one or more of the religious acts previously mentioned. The sixth paragraph provides that one-sixteenth of the net income shall be carried to a reserve fund for payment of rent and revenue, if at any time there should be no good collection of rent from scarcity of crops due to drought or inundation. The seventh paragraph provides that the remaining one-sixteenth of the net income shall be received by the mutwalli as his remuneration. This summary of the leading provisions of the wakf leaves no room for serious controversy that the dedication cannot in any sense be deemed illusory. Although provision is made for the maintenance and support of the family, children and descendants of the settlor, the ultimate benefit is reserved for the poor and for other purposes recognised by the Muhammadan Law as religious, pious, or charitable purposes of a permanent character. Indeed, there is an immediate gift to charity of a substantial character. We hold accordingly that tested in the light of the provisions of the Mussalman wakf Validating Act, no valid objection can be taken to the legality of the Wakf.

As regards the second point, it is plain that under section 3(b) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a wakf for the payment of his debts out of the rents and profits of the property dedicated. This is in accord with the case of *Luchmiput v. Amir Alum* (1), which is an authority for the proposition that a Hanafi Mussalman may execute a valid wakf by a deed which directs that the income of the property dedicated should be applied, in the first instance, for the payment of his debts, and after the discharge thereof, towards defined religious and charitable purposes. In an earlier case, *Shahazadee Hazara Begum v. Khaja Hossein Ali* (2), it had been held by Sir Barnes Peacock, C. J., that the existence of a mortgage at the time of creation of the endowment, does not render the

(1) (1882) 1 L. R. 9 Calc. 176.

(2) (1869) 12 W. R. 498 ; 4 B. L. R. 386 (A. C.).



endowment invalid under the Mahomedan Law. This view is supported by texts of the highest authority. Thus, in the Fatawai Alamgiri (text, Vol. II, p. 458, Baillie, Digest, Part I, p. 563) it is stated on the authority of the Fath-ul-Kadir (text, Vol. II, p. 638) :

"It is not a condition that the property dedicated should be free from the rights of others (hakh-ul-ghair) as in the case of pledge and bailment, so that if one were to give a lease of his land and were then to make a wakf of it before the expiration of the term, the wakf would be binding according to its conditions, and the contract of lease would not be voided, but on the expiration of the term the land would revert to the purposes to which it was dedicated. In like manner, if a man were to mortgage his land, and then dedicate it before redeeming it, the wakf would take effect, but the land would not be withdrawn in the same way from the mortgage, and if it should remain for years in the hands of the mortgagee and then be redeemed, it would revert to the uses for which it was made wakf. And if the mortgagor should die before redemption, yet if he should leave sufficient inheritance to redeem the land, it is to be redeemed and the wakf would take effect. But if he should not leave enough for that purpose, the land may be sold and the wakf would become void. In the case of a lease, when either the lessor or lessee dies, the lease becomes void, and the wakf immediately takes effect ; so in the Fath-ul-Kadir."

The statement in the Durr-ul-Mukhtar (text p. 417, tr. Brijmohan Dayal, p. 358) is expressed in similar terms :

"Wakf, during his (the dedicator's) death-illness, has the same effect as gift during that period, that is, it is valid to the extent of a third (of the dedicator's estate) when possession is delivered. Now if the wakf can take effect out of a third (of the dedicator's estate) or (his) heir sanctions it, it would take effect in full, otherwise it would fail so far as it exceeds the third. If the heir sanctions it in part, it would be valid to that extent. Wakf created by one who has mortgaged his property and is in bad circumstances as well as by an ill person who is heavily indebted is ineffectual, but not by a debtor who is not ill, provided he creates it before his becoming incompetent (for dedicating his property on account of his heavy debts). If a dedicator who is indebted provides for the payment of his debts out of the usufruct, the wakf shall be valid, but should he make no such provision, the debt shall be paid out of surplus income, after meeting the expenses of the trust economically. If he dedicates the property for the benefit of a person other than

CIVIL.

1921.

Bibi Jinjira Khatun

v.

Fakirulla.

Mookerjee, J.

CIVIL

1921.

Bibi Jinjira Khatun,

v.  
Fakirulla.

Mookerjee, J.

himself, then the income of the dedicated property shall belong to him exclusively for whom it is dedicated—Fatawa of Ibn-i-Najeem.

I say that Ibn-i-Najeem has said that the debt must be heavy, because if it is not heavy, dedication shall be valid to the extent of a third of the dedicator's estate after payment of debts, in case the dedicator has got heirs, otherwise in respect of the whole of it. If a Kazi sells the endowed property (to pay off the debts) and then some money is found, another land shall be purchased instead of the one sold. The whole of this discussion is to be found in the Is'at, under the chapter on Wakf by Sick People.

In the Wahbaniah it is said :

"If one dedicates mortgaged property and then redeems it is lawful. If he dies leaving behind money sufficient for redemption, no change (in the dedication) shall be necessary ; that is to say if he does not leave behind so much money, the wakf would fail or (the defraying of the expenses of the trust out of) the usufruct will be suspended (till payment of debt).

I say that in the Maroozat of Mufti Abu Saud it is recorded that he was enquired as to whether it was valid, for a man to dedicate his property for the benefit of his descendants and thus avoid payment of his liabilities. His reply was that it is not valid and binding and that Kazis are forbidden from enforcing and registering such trusts so far as the liabilities extend. So remember this."

In our opinion, there can be no room for real doubt that the wakf in the present case is not invalidated by reason of the circumstance that the property dedicated was under mortgage and that provision was made in the wakfnama for the discharge of the mortgage debt.

As regards the third point, it has been urged that the wakf must be pronounced invalid, in the absence of conclusive evidence to show that the possession of the properties dedicated was transferred to the mutwalli during the life time of the settlor. There is some divergence of opinion among classical mussalman jurists on the question of the elements essential for the completion of a valid wakf. Under Hanafi law, a wakf is completed, (a) according to Abu Yusuf, by the mere declaration ; (Hedaya tr. Hamilton and Grady pp. 233, 239, 240, Baillie Part I, pp. 551, 591, *Doyal v. Keramat* (1) ; (b) according to Imam Muhammad, it is completed, only if after the declaration a mutawalli is appointed and possession is delivered to him ; *Muthukana v. Vada* (2) ; (c) according to Abu Hanifa, it is

(1) (1871) 16 W. R. 116. (2) (1909-10) I. L. R. 34 Mad. 12.

completed, except in the case of a testamentary wakf, only when a decree of the Court declares that the property is the subject of a wakf, but not before; this is analogous to the *in jure cessio* of Roman Law and the *finis* of early English law; (Hedaya tr. Hamilton and Grady p. 233; Baillie, Part I. p. 550) In *Doe dem Jaen Beebee v. Abdollah* (1) Ryan C. J. and Grant J. held, after reference to the Muhammadan Law officers, that the exposition of Hanafi law by Abu Yusuf on this point should be adopted, in other words, that a valid wakf is created by declaration of endowment by the owner and delivery of possession is not essential. This decision, so far as we have been able to trace, does not appear to have been doubted in this Court, and was followed in *Ramsan v. Zahur* (2) as an authority for the proposition that the appointment of a mutwalli is not essential to the validity of a wakf. It may also be observed that in *Khajah Hossein Ali v. Hazra Begum* (3). Mr. Justice Kemp whose opinion prevailed against that of Mr. Justice Markby and was upheld on appeal under the Letters Patent *Shahazadee Hazara Begum v. Khaja Hossein Ali* (4), observed that decisions are primarily given according to Abu Yusuf and next according to Imam Mohammad; and this preference to the opinion of Abu Yusuf is supported by the statement in the Fatawai Alamgiri (text, Vol. II, pp 454-455). Reference may also be made to the following passage from the Suzzat-ul-Fatawa, p. 430:

"Though according to Mohammed, consignment of the dedicated property and separation of it (from the other properties of the wakf) are necessary to the completion of a wakf, according to Abu Yusuf, the wakf becomes absolute and binding, like emancipation, on the mere declaration of the wakf, and his right therein becomes extinguished at once. And in the Khulasa it is laid down that the jurists of Balkh decide according to the rule laid down by Abu Yusuf, and Sadr ush-Shahid has stated that the fatwa is according to him; and in the Fath ul Kadir it is mentioned that Abu Yusuf's opinion is the accepted doctrine; and in the Munnieh it is stated that the fatwa is with Abu Yusuf, and this is the rule accepted by the jurists of Balkh. But the Bokharites have adopted Mohammed's opinion. And in the Shar-i-Vikayah and the commentary of Mulla Khusru (the Durrar-ul-Akham) it is laid down that the Fatwa is with Abu Yusuf. In some places, it is mentioned in the Khanieh (Fatawai Kazi Khan) that the fatwa is with Mohammed. But in the

CIVIL.

1921.

Bibi Jinjira Khatun

v.

Fakirulla.

Mookerjee, J.

(1) (1838) Fulton 345.

(2) (1913) 18 L. C. 240.

(3) (1869) 12 W. R. 344.

(4) (1869) 12 W. R. 498.

CIVIL.

1921.

Bibi Jinjira Khatun

v.  
Fakirulla.

Mookerjee, J.

Muhit it is laid down that the universality of our jurists have adopted the rule laid down by Abu Yusuf—and this is correct.”

In a recent case in the Allahabad High Court, however, (*Muhammad Asisuddin v. Legal Remembrancer* (1) where the decision in *Doe dem Jaun Beebee v. Abdollah* (2), was not brought to the notice of the Court, preference was given to the opinion of Imam Mohammad. We do not see sufficient reason to depart from the rule which was enunciated more than eighty years ago by the Supreme Court and is not shown to have been ever successfully challenged. We notice that the question was raised but not actually decided in *Banubi v. Narsing rao* (3) inasmuch as, in the circumstance of that case, there was neither declaration of wakf nor delivery of possession; a mere intention to set apart property for charitable purposes was clearly not sufficient to create a valid wakf: *Mulla v. Subramania* (4) In the present case, there is a further difficulty in the path of the appellants. Here the settlor had appointed himself as the first mutwalli, and in such a contingency, no formal delivery of possession from himself to himself would be necessary even accordingly to Imam Mohammad: *Abdul v. Bai Jimbabi* (5). We must further remember that the wakfnama was executed on the 31st January, 1915, and the settlor died on the 15th April 1915. It can hardly be expected that during this short period, there could be many transactions indicative of transmutation of possession. But such evidence as there is on the record points to the conclusion that, after the execution of the wakfnama, the settlor held the dedicated property, not as owner but as mutwalli. The direct oral evidence on the point is corroborated by the collection papers, the counterfoils of rent receipts, the plaints in rent suits and the power of attorney which have been produced to show that after the date of the wakfnama Elahi Buksh held and managed the endowed property in the character of mutwalli. There is consequently no room for the application of the principle which has sometimes been recognised, namely, that where the declaration of a wakf is not acted upon by the settlor and its objects are not given effect to, it may be presumed that the wakf was not completed or that the settlor had no *bona fide* intention to create a wakf; *Delroos Banoo v. Nawab Ashgur Ally* (6); *Zoolaka v. Zynul Abedin* (7). We hold accordingly that delivery of possession was not a pre-requisite to the

(1) (1893) I. L. R. 15 All. 321.

(2) (1838) Fulton 345.

(3) (1906) I, L. R. 31 Bom. 250.

(4) (1916) 34 M. L. J. 431.

(5) (1911) 14 Bom. L. R. 295.

(6) (1875) 15 B. L. R. 167.

(7) (1904) 6 Bom. L. R. 1058 (1066).

validity of the wakf in the present case, and that even if transmutation of possession was necessary, no formal delivery was essential, as the settlor was himself the first mutwalli. The third ground consequently fails.

As regards the fourth point, it has been urged that the wakf was invalid to the extent of a two-thirds share inasmuch as it was executed by the settlor in death-illness without the consent of the future heirs. The Subordinate Judge negatived this contention as, in his opinion, the evidence did not establish that the settlor was in death-illness at the time of execution of the deed of wakf. Before we refer to the evidence on the point, the requisites of the Mahommadan law on the subject may be usefully recalled here. It is well-settled that gifts made by a Mussalman during marz-ul-maut or death-illness cannot take effect beyond a third of the surplus of his estate, after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect: *Ibrahim v. Saiboo* (1); nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death: *Khajooroonessa v. Rowshan* (2); *Bafatun v. Bilaiti* (3). Similarly, a wakf made in death-illness is valid only to the extent of a third of the net estate left by the deceased, unless the heirs consent: Baillie, Part I. p. 601, Part II. p. 212; *Ali Husain v. Fazal Husain* (4). The substance of the matter is that a Muslim who is in marz-ul-maut or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a wakf in such illness, unless his heirs assent, the wakf will affect only one-third of his estate and will be invalid in respect of the excess; and it is important to add that this principle operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated mutwalli. In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death, namely, (a) proximate danger of death, so that there is a preponderance of apprehension of death; (b) there must be some degree of subjective apprehension of death in the mind of the sick person; and (c) there must be some external indicia, such as inability to attend to ordinary avocations. Whether or not a particular illness constitutes marz-ul-maut is primarily a question of

CIVIL.

1921.

Bibi Jinjira Khatun

Fakirulla.

Mookerjee, J.

(1) (1907) I. L. R. 35 Calc. 1 (22); L. R. 34 I. A. 167; 6 C. L. J. 695.

(2) (1876) L. R. 3 I. A. 291; I. L. R. 2 Calc. 184.

(3) (1903) I. L. R. 30 Calc. 683.

(4) (1914) I. L. R. 36 All. 431.

Civil.  
1921.  
Bibi Jinjira Khatun  
v.  
Fakirulla.  
Mookerjee, J.

fact, as stated by Lord Robertson in *Ibrahim v. Saiboo* (1), but it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *marz-ul-maut* as formulated by Mahomedan jurists. The leading authorities in this Court which support these propositions are the cases of *Hassarat Bibi v. Golam Jaffar* (2), and *Fatima Bibee v. Ahmad Baksh* (3), which was affirmed by the Judicial Committee in *Fatima v. Ahmad* (4). In the case last mentioned, the three elements emphasised were (1) illness (2) expectation of a fatal issue and (3) certain physical incapacities which indicate the degree of the illness. The second condition, it was pointed out, cannot be presumed to exist from the existence of the first, while the incapacities indicated in the third condition (with perhaps the single exception of the case where a man cannot stand up to say his prayers) are more or less of an empirical character, based upon an imperfectly developed science of diagnosis and cannot possibly serve as infallible signs of death-illness. The importance of the subjective element was emphasised in the course of argument and will be found developed in the texts set out by Mahomed Yusuf in his Tagore Law Lectures on Marriage, Dower and Divorce, Vol. III, paras 2919-2924, 2945-2947. This view, however, is repudiated by Sir Abdur Rahim in his Tagore Law Lectures on Mahomedan Jurisprudence (p. 255) where reference is made to *Kulsom v. Golam* (5). A view similar to that adopted in this Court has been taken in the Bombay High Court in the cases of *Sarabai v. Rabiabai* (6) and *Rashid v. Sherbanoo* (7); by the Allahabad High Court in the cases of *Labbi v. Bibbun* (8); *Muhammad Gulshere v. Mariam Begam* (9); *Mashud Hasan v. Anwar Husain* (10); *Sayeed v. Ismail* (11); *Nazar v. Rafee* (12); *Khurshed v. Faiyaz* (13); *Sheikh Mohammad v. Khadeja* (14); *Wasir Jan v. Altaf Ali* (15); *Fazl Ahmad v. Rahim Bibi* (16); and by the Patna High Court in *Fazlur Rahman v. Muhammad Umar* (17). (See also Durrul Mukhtar

(1) (1907) L. R. 34 I. A. 167; I. L. R. 35 Calc. 1.

(2) (1898) 3 C. W. N. 57.

(3) (1903) I. L. R. 31 Calc. 319.

(4) (1907) L. R. 35 I. A. 67; I. L. R. 35 Calc. 271; 7 C. L. J. 122.

(5) (1905) 10 C. W. N. 449.

(6) (1905) I. L. R. 30 Bom. 537.

(7) (1907) I. L. R. 31 Bom. 264.

(8) (1874) 6 All. H. C. R. 159.

(9) (1881) I. L. R. 3 All. 731.

(10) (1909) 6 All. L. J. R. 503.

(11) (1910) 7 A. L. J. R. 1176; I. L. R. 33 All. 233.

(12) (1911) 8 A. L. J. R. 1154.

(13) (1914) I. L. R. 36 All. 289; 12 A. L. J. R. 417.

(14) (1914) 12 A. L. J. R. 132.

(15) (1887) I. L. R. 9 All. 357.

(16) (1917) I. L. R. 40 All. 236.

(17) (1917) 3 Pat. L. W. 232.

tr. Dayal p. 411. Hedaya tr. Hamilton and Grady p. 685 and Baillie Part I pp. 551-552). We have now to consider, whether the evidence shows that, in the words of Lord Robertson in *Ibrahim v. Saiboo* (1), the wakf was made "under the pressure of the sense of imminence of death." The deed of wakf, as we have seen, was executed on the 31st January, 1915, and was registered on the following day. The defendants rely chiefly upon documentary evidence to show that from the beginning of November, 1914, to the middle of January, 1915, Elahi Bux was ill and that he was laid up again in the second week of March, 1915. The defendants have also adduced oral evidence to show that Elahi Bux was ill continuously from November, 1914, to April, 1915 when his death took place. The Subordinate Judge has carefully analysed the oral evidence and has come to the conclusion that the persons who have come forward to depose in favour of the defendants cannot be regarded as witnesses of truth. After examination of this evidence in detail, we see no reason to doubt that the Subordinate Judge correctly estimated its value, specially as the witnesses, almost without exception, are not free from bias. As regards the documentary evidence, it appears that in a suit instituted by Elahi Bux against one Ataraddin Mandal and others for arrears of rent, the defendants cited him as a witness. The result was that on the 3rd November, 1914, Elahi Bux applied for time to give his evidence, and four days later, he prayed that as he was an old man of 77, bedridden with fever for a week, he might be examined on commission. This was supported by an affidavit from kabiraj Sris Chandra Sen who certified that he was suffering from chronic intermittent fever; this kabiraj has been examined as a witness in this case. An order was made for the issue of a commission, but a postponement was obtained, as the pleader was unwell on the date fixed (7th March, 1915). Thereupon the commissioner went to examine Elahi Bux on the 14th March, 1915, but he was asked to postpone the examination, as the illness had increased and the patient had very little hope of surviving. This was supported by a certificate from kabiraj Satis Chandra Sen stating that Elahi Bux was confined to bed from fever, piles and pain, that he was unable to speak and that there was danger of death if he gave his deposition. Neither the commissioner nor the kabiraj has been examined as a witness, and the statements in the report by the commissioner to the Court and in the certificate given by the kabiraj are not admissible in evidence. But, the statements, even if admitted, do not show the condition of Elahi Bux on the 31st

CIVIL.

1921

Bibi Jinjira Khatun

v.

Fakirulla.

Mookerjee, J.

(1) (1907) L. R. 34 I. A. 167; I. L. R. 35 Cal. 1.

CIVIL

1921.

Bibi Jinjira Khatun

v.

Fakirulla.

Mookerjee, J.

January, 1915, when the wakfnama was executed. The Subordinate Judge has further observed that Elahi Bux was perhaps reluctant to give evidence and that the allegations as to the state of his health were not improbably exaggerated. This finds some support in the evidence adduced by the plaintiffs, which relates to a point of time much nearer to the date of execution of the wakfnama than the evidence of the incidents mentioned by the witnesses of the defendants. The evidence led by the plaintiffs shows that in January 1915 Elahi Bux went to the house of his father-in law at Rajarampore, which involved a journey by bullock cart over 12 to 14 miles of road. One of these journeys was shortly before, while the other was shortly after, the 31st January, 1915. On his return journey, he lost a silver betel-pot and on the 6th February, 1915, he lodged information at the police station. He had also an altercation on the way with Kadir Bux, a witness in this case, who laid an information with the police against Elahi Bux and his peon on the 21st January, 1915. There can thus be no doubt on the oral evidence, supported by reliable documentary evidence, that between the 21st January and the 6th February, 1915, the state of health of Elahi Bux was such that he was able to go from village to village to see his friends and relations, to arbitrate in the settlement of disputes of other people, and to follow the ordinary avocations of life. In cases of this character, when direct evidence of the state of health of the settlor on the date of the deed is not available, the evidence of antecedent and subsequent conditions of the settlor should converge to that point of time; this test is well-satisfied in the present case. Even if it be assumed that Elahi Bux was ill in November and December, 1914, and in the first week of January, 1915, and further that he was ill again from the middle of March till his death in the middle of April, the validity of the wakfnama executed on the 31st January, 1915, cannot be successfully impeached on the ground of *marz-ul-maut*, when there is positive evidence to show that from the middle of January to the middle of February, 1915, which includes the date of execution of the deed, he was in a fairly good state of health. In such circumstances, it cannot be urged that the wakfnama was executed under the pressure of the sense of imminence of death. We hold accordingly that the conclusion of the Subordinate Judge on this part of the case cannot be successfully challenged.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Buckland J.—I agree and have nothing to add.

A. T. M

Appeal dismissed



Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice  
Panton.

RANI HEMANGINI DEBI AND OTHERS

v.

SARAT SUNDARI DEBYA AND OTHERS\*.

CIVIL.

1921.

July, 12.  
August, 11.

*General grant—Duration—Probate and Administration Act (V of 1881), Secs. 50, 76, 82, 92—Judgment in rem—Several executors—Powers, if can be executed by some.*

A general grant made in terms of section 76 of the Probate and Administration Act is operative under section 82 until the probate shall have been recalled or revoked on one or other of the grounds enumerated in section 50 in an appropriate proceeding instituted before a Court competent to exercise jurisdiction in that behalf.

Where a judgment operates as a judgment *in rem* (as the decision of a probate Court does under section 41 of the Indian Evidence Act) it is not subject to collateral attack; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts.

Where there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any of them who has proved the will: *Satya Prashad v. Mstilal* (1).

Appeal by the Plaintiffs.

Suit for contribution.

The material facts appear from the judgment.

*Babus Mohendra Nath Ray, Preo Sankar Majumdar, Phanindra Lal Maitra and Rama Prosad Mookerjee* for the Appellants.

*Babus Dwarka Nath Chuckerbutty, Rama Kanta Bhattacharyya Krishna Kamal Maitra and Jatindra Nath Lahiri* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

**Mookerjee J:**—This is an appeal by the plaintiffs in a suit for contribution, which has been instituted by them as executors to the estate of the late Raja Jogendranath Ray of Natore. The case for the plaintiffs is that on the 19th September, 1916, they satisfied a mortgage decree which was operative against the estate of their testator as also the properties of the defendants. They consequently pray for recovery of specified sums by way of contribution from

August, 11.

\*Appeal from Original Decree No. 268 of 1920, against the decree of Babu Satis Chandra Basu, Subordinate Judge of Rajshahi, dated the 21st August, 1920,

(1) (1900) 1 L. R. 27 Cal. 683.

CIVIL.

1921.

Rani Hamangini

v.

Sarat Sundarl.

Mookerjee, J.

different sets of defendants. The defendants repudiate the validity of the claim and also contend that the plaintiffs are incompetent to maintain the action. The Subordinate Judge has dismissed the suit on the preliminary point on two grounds, namely, first, that before the institution of the suit, the executorship of the plaintiffs must be deemed to have terminated when the heir-at-law of the deceased testator attained majority; and, secondly, that even if the executorship has not terminated, the plaintiffs, who are three out of four surviving executors, are not competent to maintain the action, as the will contemplated that at least six executors should take joint action. On the present appeal, the plaintiffs have controverted the view adopted by the Subordinate Judge on the question of the competency of the suit. We shall examine the two points raised by the appellants in the order stated above.

As regards the first point, it is not disputed that Raja Jogendra-nath Ray made a testamentary disposition of his properties on the 11th May, 1900, that after his death the will was duly proved on the 2nd April, 1902, and that on the 23rd June, 1902, the District Judge granted probate to seven persons (named as executors therein) in the form prescribed by section 76 of the Probate and Administration Act. This grant is not in express terms limited in duration, and, attracts the operation of section 82, which provides that after the grant of probate, no other than the person to whom the same shall have been granted, shall have power to sue or prosecute any suit or otherwise act as representative of the deceased throughout the province in which the same may have been granted, until such probate shall have been recalled or revoked. The plaintiffs contend that inasmuch as the probate has admittedly been neither recalled nor revoked, no question can arise as to their competence to institute the present suit. The defendants urge that as under section 3 of the Probate and Administration Act the term "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator, the scope of the grant should be interpreted in the light of the provisions of the will, and, further, that if this rule of construction be applied, it will be found that the grant has ceased to be operative, because the clear intention of the testator, to be gathered from his will, was that the executors should cease to hold office on the attainment of majority by the heir-at-law. This argument plainly raises two distinct questions, namely, first, is it open to a Court, other than the Court which granted the probate, to investigate whether a grant expressed in general terms and not

explicitly limited in duration, has expired by reason of the provisions of the will, and, secondly, if such collateral attack is permissible in a Court other than the Court of probate, had the grant in the present case ceased to be operative before the commencement of this litigation? As regards the first of these points, the plaintiffs have maintained that where a grant is not expressly limited in duration but is formulated in general terms, the Court of probate and that Court alone is competent to determine whether it has ceased to be operative, in other words, whether occasion has arisen to recall or revoke the grant. In support of this proposition, reference has been made to sections 50 and 82 of the Probate and Administration Act. Section 50 provides that a grant of probate may be revoked or annulled for just cause which is defined to include amongst others the contingency that the grant has become useless and inoperative through circumstances. The argument in substance is that a general grant made, in terms of section 76 is operative under section 82 until the probate shall have been recalled or revoked for the reason, amongst others, specified in section 50 that the grant has become useless and inoperative through circumstances. In our opinion, this contention is well-founded. This view receives support from the principles which underlie the decisions in *Surendra Nath v. Amrita Lal* (1) and *Chandra Kumar v. Prasanna Kumar* (2). In the former case, it was ruled that the phraseology of the fourth clause of section 50 is sufficiently general to make it applicable to cases where the circumstances contemplated have happened since the date of the grant. In the latter case, it was ruled, on the authority of the decision of the Judicial Committee in *Bombay Burmah Trading Co. v. Smith* (3), that so long as the person entitled to the estate has not taken it out of the possession of the executors, they are entitled to continue in occupation of the estate. The principle need not be affirmed in an unqualified form that "once an executor always an executor": it is sufficient to hold that a general grant must be deemed to continue in force until the probate or letters of administration shall have been recalled or revoked by the Court of probate on one or other of the grounds enumerated in section 50. We are not now called upon to consider whether an order for revocation is necessary, when a grant has been, in express terms, limited in duration, and the time specified has elapsed. But we observe that even upon that question, there has been divergence of judicial opinion in other systems of law. Thus in *Offley v. Best* (4);

CIVIL.

1921.

Rani Hemangini.

v.  
Sarat Sundari.

Mookerjee, J.

(1) (1919) 23 C. W. N. 763. (2) (1921) 33 C. L. J. 451.

(3) (1894) 1 L. R. 19 Bom. 1. (4) (1643) 1 Sid. 370.

## CIVIL.

1921.

Rani Hemāngini

Sarat Sundari

Mookerjee, J.

*Freke v. Thomas* (1); *Slater v. May* (2); *In re Metcalfe* (3) and *Howell v. Metcalfe* (4), it appears to have been assumed that no revocation was necessary, where the grant, on the face thereof, was limited in duration and the prescribed period had elapsed. Reference may also be made to the judgment of Sir John Nicholl in the case of *In the goods of Cassidy* (5), where, as Judge of the Prerogative Court, he did not revoke a grant of administration with will annexed to an attorney of the executor who was abroad, but pronounced it to have ceased and expired on application of the executor for probate and on affidavit that no suits were pending. It was further directed that future grants *durante absentia* should be expressly limited until the executor of party entitled to administration should duly apply for and obtain a grant; see also *Webb v. Kirby* (6); *Re Rendall* (7); *Hewson v. Shelley* (8); *Rainbow v. Kittoe* (9); *Suwerthrop v. Day* (10). On the other hand, in *Pipon v. Wallis* (11); *In the goods of Phillips* (12) and *In the goods of Newton* (13), the view was favoured that even in such cases, a formal order of revocation is necessary. Substantially to the same effect is the decision of Lord Eldon and Sir William Grant, M. R. in *Rainsford v. Taynton* (14). A similar view has been adopted in the United States as appears from the decision in *Morgan v. Dodge* (15). But whatever room for difference of opinion there may be elsewhere in cases of grants expressly limited in duration or made for a specific purpose, it is fairly clear that under our statutory provisions a grant made in general terms must be deemed to continue in operation till revoked or recalled in an appropriate proceeding instituted before a Court competent to exercise jurisdiction in that behalf. This conclusion is in harmony with the elementary rule that where a judgment operates as a judgment in rem (as the decision of a probate Court does under section 41 of the Indian Evidence Act) it is not subject to collateral attack; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts. This view renders unnecessary an examination of the second point, namely, assuming, that the grant

(1) (1792) 1 Salk. 39; 1 Ld. Raym. 667.

(2) (1705) 1 Salk. 47; 2 Ld. Raym. 1071.

(3) (1822) 1 Add. 343.

(4) (1824) 2 Add. 348.

(5) (1832) 4 Hagg. 360.

(6) (1857) 7 DeG. M. and G. 376.

(7) (1901) 1 Ch. 230.

(8) (1914) 2 Ch. 13 (43).

(9) (1916) 1 Ch. 316.

(10) (1838) 8 A. and E. 624.

(11) (1753) 1 Lee 402.

(12) (1824) 2 Add. 335.

(13) (1843) 3 Curt. 428; 7 Jur. 219.

(14) (1802) 7 Ves. 460.

(15) (1862) 44 New Hampshire 255; 82 Am. Dec. 213.

can be collaterally attacked in the present suit, did it in law expire on the attainment of majority by the heir-at-law? It is manifest, however, that the construction of the will as propounded by the defendants cannot be supported. The third clause of the will does not lay down that the executorship would terminate on the attainment of majority by the grandson of the testator. It is clear, even on the terms of that clause taken by itself, that the executorship might continue after the heir-at-law should have attained majority. But the other clauses of the will leave no room for doubt on this point; reference may be made specially to the provisions of clauses 9 and 10 which deal with the expenses of maintenance and education of the grandson, or in the event of his death, of the adopted son, and also the expenses of maintenance and marriage of the grand-daughters and their sons and grandsons. We are of opinion that the testator did not intend that the executors should cease to hold office immediately on the attainment of majority by his grandson. From both these standpoints, we must hold accordingly that the authority of the executors had not lapsed before the commencement of this litigation.

As regards the second question, the Subordinate Judge has held that in view of the direction in the will that there should be at least six executors acting at the same time, three executors cannot maintain this suit. We have examined the provisions of the will and we are unable to uphold the view taken by the Subordinate Judge. We are fortified in our opinion as we find that this very will was so interpreted by Holmwood and Imam JJ. in another case which came up to this Court, when they ruled that three executors out of the four who had obtained probate were competent to carry on proceedings in execution of a rent decree. In our judgment, the will affords no clear indication that the testator intended to supersede the rule enunciated in section 92 of the Probate and Administration Act, namely, that when there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any of them who has proved the will; *Satya Prashad v. Motilal* (1). In the case before us, probate was granted to seven executors; three of them have died and their places have not been filled up; three others have instituted this suit, and the remaining executor who refused to join as a plaintiff has been included in the category of defendants. We are not prepared to say that the provisions of the will invalidate a suit so framed.

(1) (1900) 1. L. R. 27 Calc. 683.

Civil  
1901.  
Rani Hemangini  
vs.  
Sarat Sundari.  
Hookerjee, J.

CIVIL.

1921.

Rani Hemangini

Sarat Sundari.

Mookerjee, J.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for retrial on the merits. The plaintiffs are entitled to their costs in this Court. The costs in the Court below will be in the discretion of the Subordinate Judge. As the suit has been dismissed on a preliminary ground, we direct, under section 13 of the Court-Fees Act, that the court-fees paid on the memorandum of appeal be refunded to the appellants.

A. T. M.

*Appeal allowed.*

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr.  
Justice Pearson.*

PROFULLA CHANDRA GHOSE AND ANOTHER

v.

BABURAM MANDAL AND OTHERS.\*

CIVIL.

1921.

July, 19.

*Possession, suit for—Limitation—Dispossession by landlord—Bengal Tenancy Act (VIII of 1885), section 148 A, schedule III, Art. 3—Arrears of rent, recovery of.*

Article 3, schedule III of the Bengal Tenancy Act is applicable, where the dispossession is effected by the tenants settled upon the land by co-sharer landlords with the help of their nalb : *Raja Peary Mohan v. Arunoday* (1).

A suit under section 148 A of the Bengal Tenancy Act should be to recover the whole of the arrears due and not the entire rent payable for the holding : *Brahmanand v. Hem* (2) followed. *Rai Baikantha Nath v. Ramapati* (3) distinguished.

Appeal by Defendants Nos. 1 and 2.

Suit to recover the plaintiff's share of the holding.

The material facts appear from the judgment.

*Babus Sarat Chandra Roy Choudhuri and Anilendra Nath Roy Choudhuri* for the Appellants.

*No one* for the Respondents.

\* Appeal from Appellate Decree No. 1964 of 1919, against the decree of Babu Hafipada Banerji, Additional Subordinate Judge of Khulna, dated the 4th July, 1919, modifying that of Babu Binod Behari Roy, Munsiff, Second Court, at Satkhira, dated the 15th April, 1918.

(1) (1920) 25 C. W. N. 168.

(2) (1914) 18 C. W. N. 1016 (1019).

(3) (1917) 27 C. L. J. 101.

The judgment of the Court was as follows :

This appeal arises out of a suit by one of the heirs of a deceased tenant to recover his share of the holding which was sold in execution of a decree for arrears of rent obtained by two co-sharer landlords and purchased by the latter.

The plaintiff was not made a party to the suit for rent and he brought the suit on the ground that he was not bound by the decree for rent and that the decree did not affect his interest specially as the suit was not framed under section 148A of the Bengal Tenancy Act.

The defence was that the suit was barred by the special limitation of 2 years under article 3, schedule III of the Bengal Tenancy Act that the decree was one under section 148A and that the sale held thereunder passed the entire holding.

The Court of first instance dismissed the suit. On appeal, the decree was reversed and the suit was decreed.

The defendants Nos. 1 and 2 who are the landlords have preferred this appeal.

Two questions arise for our decision. The first is whether the suit is barred by limitation.

The ground upon which the Subordinate Judge over-ruled the plea of limitation was that the dispossession was by a co-sharer landlord as auction-purchaser and he relied upon the case of *Krishna Chandra Bagdi v. Satish Chandra Banerji* (1).

There is a conflict of decision on the point whether dispossession by a landlord as auction-purchaser was caused under article 3 schedule III of the Bengal Tenancy Act. In the present case, it is admitted in the plaint that the dispossession was not by the landlord at the time of delivery of possession to him as auction-purchaser, but subsequent to the delivery of possession and that the dispossession was effected by the tenants who had been settled upon the land by the co-sharer landlords, and with the help of the landlord's naib. In these circumstances the question of the landlord being the auction-purchaser does not arise and the suit would be barred by limitation [See the case of *Raja Peary Mohan Mookerjee v. Arunoday Ghose* (2)]. There is, however, no clear finding that the landlord or his agent along with other defendants dispossessed the plaintiff. We think that there should be a clear finding on the point. If the Court finds that the dispossession was by the landlord or his agent, the suit would be barred by limitation.

The second question is whether the suit is one under section

(1) (1915) 24 C. W. N. 872.

(2) (1920) 25 C. W. N. 168.

CIVIL.  
1921.  
Profulla  
v.  
Baburam.  
July, 19.

CIVIL.

1921.

Profulla

v. Baburam.

148A of the Bengal Tenancy Act. The learned Subordinate Judge was of opinion that it was not because a "suit to recover the whole rent is a condition precedent to section 148A suit." If, by that, the learned Judge meant to say that the suit must be to recover the whole of the arrears due, he is right; but if he means the *entire rent payable* for the holding, we do not think that that is a correct view. The learned Judge refers to the case of *Rai Baikantha Nath Sen Bahadur v. Ramapati Chatterjee* (1), but the facts of that case are distinguishable from the present. It appears that in that case the plaintiff sued to recover his share of the rent and did not seek to recover the entire rent due to himself and his co-sharers. There was merely an alternative prayer that if it was found that the tenant had not paid the rent due to his co-sharers he might be allowed to amend his plaint so as to secure a decree for the entire rent. On the other hand in the suit for rent in the present case, the co-sharer landlord who was not in separate collection of rent, stated that he had inquired of his other co-sharers whether they had realised any rent and the latter did not give him any information, and that in those circumstances he believed that the rent which was due to him was the only arrears due for the holding. His co-sharers were made parties to the suit and the plaintiff stated that if his co-sharer's share of the rent had remained unpaid, he (the plaintiff) was willing to pay court-fee on that sum also. He claimed a decree for the entire arrears, and prayed that his co-sharers might be joined as plaintiffs if they chose to be co-plaintiffs. The case is similar to that of *Brohmanand Nath Deb Sircar v. Hem Chandra Mitra* (2). In that case the learned Judges observed as follows:—"We have been invited to construe the expression rent due as equivalent to rent payable under the contract of tenancy. This argument in substance is that to entitle a person to claim the benefit of section 148 he must include in the suit a claim not for the rent actually in arrears but the rent payable under the contract without the deduction of any amount that might have been actually paid to the land-lord. This clearly is an untenable contention. We may further add that it has not been suggested at any stage of the present proceeding nor was the suggestion made in the course of the original suit that at the time of the commencement of the litigation, there was an arrear of rent due to the co-sharer landlords. The plaintiff sued for the recovery of what to his information was the whole arrear due and that was in essence a suit for rent due to all the co-sharers within the meaning of section 148A of the

(1) (1917) 27 C. L. J. 101.

(2) (1914) 18 C. W. N. 1016 (1019).



Bengal Tenancy Act." Those observations apply to the facts of the present case.

We think in these circumstances that the suit was substantially one framed under section 148A of the Bengal Tenancy Act.

The question, however, whether the suit for rent was brought against the registered tenant was not gone into by the learned Subordinate Judge; because having found that the suit was not one framed under section 148A of the Bengal Tenancy Act, it was unnecessary for him to consider the question whether the rent suit was so framed as to affect the interest of the plaintiff. As, however, we have come to the conclusion that the suit was framed under section 148A, we think the lower appellate Court should consider the question whether the persons against whom the rent decree was obtained represented the interest of the plaintiff as well so that the sale held thereunder passed the interest of the plaintiff also.

The decree of the lower appellate Court is accordingly set aside and the case sent back to that Court in order that Court may come to a finding on the questions indicated above and dispose of the case according to law.

Costs to abide the result.

A. T. M.

*Appeal allowed: Case remitted.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

H. H. MAHARAJA OF COOCH-BEHAR AND OTHERS

v.

RAJA MAHENDRA RANJAN RAI CHAUDHURI\*

and

ABDUL MAJID BASUNIA AND OTHERS

v.

RAJA MAHENDRA RANJAN RAI CHAUDHURI

AND OTHERS.\*

*Possession, suit for—Limitation Act (IX of 1908), Sch. I, Art. 46—Limitation law, rule of construction of—Order under section 40 (1) of the Bengal Survey Act (V. B. C. of 1875)—Suit, when instituted—Civil Procedure Code (Act V of 1908), O. & R. 2—Survey and thak maps, preference between—Thak map, evidence—Adverse possession—Land after submergence—Submergence, seasonal—Wrong-doer—Constructive possession.*

\*Appeals from Original Decrees Nos. 229 of 1919 and 93 of 1920, against the decisions of Babu Surendra Kumar Ghosh, Subordinate Judge of Jalpaiguri, dated the 2nd July, 1919.

CIVIL.

1921.

Profulla

Baburam.

CIVIL.

1921.

June, 17, 20, 21.  
August, 19.

## Civil.

1931.

H. H. Maharaja of  
Cooch-BiharRaja Mahendra  
Raijan.

A possessory order under section 40 (1) of the Bengal Survey Act, bears an analogy to a decision under section 34 of Regulation VIII of 1822. The order, until reversed or modified by competent authority has the force of an order of a civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector.

It is contrary to sound canons of construction to enlarge the scope of the provisions of a statute of limitation, by importing into it words which are not to be found there.

A suit instituted more than three years had elapsed from the date of the order under section 41 of the Bengal Survey Act, is not barred by limitation under article 46 schedule I of the Limitation Act.

A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered.

If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred under order 2 rule 2 of the Code of Civil Procedure. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant: *Raja of Pilapur v. Suriya Rau* (1) and other cases.

There is no inflexible rule that a survey map must have preference over a thak map. There is no general or definite rule making it incumbent upon the Courts to follow either the one or the other; the Court may, if it considers that the thak map is more reliable, follow that in preference to the survey map.

Where the thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to the suit, the thak map is a valuable evidence in a suit between the successors of the persons who were present: *Dunne v. Dharani Kanta* (2).

Land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner: *Secretary of State v. Krishnamoni* (3). This principle is applicable where the reflooding is seasonal and occurs for several months in each year: *Kumar Basant v. Secretary of State* (4). When the land is re-submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner.

The possession must be adequate in continuity, in publicity, and in extent of area, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass.

The doctrine of constructive possession cannot be applied in favour of a wrong-

(1) (1885) L. R. 12 L. A. 116; I. L. R. 8 Mad. 520.

(2) (1908) I. L. R. 35 Calc. 621.

(3) (1902) L. R. 29 P. A. 104; I. L. R. 29 Calc. 513 (518).

(4) (1917) L. R. 44 L. A. 104; I. L. R. 44 Calc. 858; 25 C. L. J. 487.

doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the position of the land in suit of which he proves actual possession for the statutory period : *Mohini v. Fromoda* (1).

Appeals by the Defendants.

Suits for possession.

The material facts appear from the judgment.

*Babus Ram Charan Mitra* and *Atul Chandra Dutt* for the Appellants.

*Babus Dwarka Nath Chuckerbutty* and *Kali Kinkar Chuckerbutty* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

**Hookerjee, J.**—The subject matters of the litigations which have led up to these two appeals are two tracts of land in the district of Jalpaiguri. The rival claimants are the Raja of Kakina and the Maharaja of Cooch-Behar. The lands, which have been formed by the recession of the river Shaniajan, are claimed by the former as included in his village Sibram and by the latter as comprised in his village Jamgram. The first suit was instituted in the Court of the Munsiff of Jalpaiguri and the second in the Court of the Subordinate Judge of the same District; but the former suit was transferred, for the sake of convenience, to the Court of the Subordinate Judge, and the two suits were tried together on the same evidence. The suits were ultimately decreed in part, on the basis of a report made by a civil Court amin. The decrees made by the Subordinate Judge have been assailed in this appeal, substantially on four grounds, namely, first, that the suits were barred by the three years rule of limitation under Arts. 46 and 47 of the schedule to the Indian Limitation Act; *secondly*, that the trial of the suit instituted in the Court of the Subordinate Judge is barred by the provisions of order 2 rule 2 (2) of the Civil Procedure Code; *thirdly*, that the boundary between the two villages has not been correctly ascertained, and *fourthly*, that the defendants have acquired a statutory title by adverse possession for more than twelve years.

In support of the first ground, reliance has been placed as well upon Art. 46 as upon Art. 47. Art. 46 provides that a suit by a party bound by such award, that is, an award mentioned in Art. 45, to recover any property comprised therein must be instituted within

(1) (1896) 1, L. R. 24 Calc. 256.

CIVIL.

1921.

H. H. Maharaja of  
Cooch-Behar

Raja Mahendra  
Ranjana.

August, 19.

CIVIL.

1921,

H. H. Maharaja of  
Cooch-Bihar :Raja Mahendra  
Ranjan :

Mookerjee, J.

three years from the date of the final award or order. The awards mentioned in Art. 45 are awards under the Bengal Land Revenue Settlement Regulation, 1822, the Bengal Land Revenue Settlement Regulation, 1825 and the Bengal Land Revenue Regulation, 1833. It is not disputed that in the cases before us there is no award under any of the three Regulations mentioned. What is set up as a bar is an order under section 41 of the Bengal Survey Act, 1875, made on the 10th June, 1912 by an Assistant Superintendent of Survey. That order is of no assistance to the appellants for two reasons. In the first place, the order is not an award under any of the three Regulations mentioned. The nature of a possessory order under section 34 of Reg. VII of 1822 was explained by the Judicial Committee in *Jowala Buksh v. Dharum Singh* (1) and *Rajah Sahib Perhlad v. Rajender Kishore* (2) and need not be investigated here. Let it be conceded that a possessory order under section 40 (1) of the Bengal Survey Act 1875 bears an analogy to a decision under section 34 of Reg. VII of 1822; it would still be contrary to sound canons of construction to enlarge the scope of the provisions of a statute of limitations, by importing into them words which are not to be found there. An attempt of this description was made in the cases of *Ibrahim Ali v. Hadi Ali* (3) *Sheodas v. Bandhu* (4) and *Zainul Abidin v. Durga Dai* (5), when it was argued that an order or award under the N. W. P. Land Revenue Act 1873, which was similar in scope to the Regulations, attracted the operation of Art. 45, even though that statute was not one of the three Regulations expressly mentioned. This contention was rightly overruled, for extension by analogy is clearly not permissible in such a case. A similar view was adopted in *Oodoy Singh v. Paluck Singh* (6) where the three years rule was attempted to be made applicable to an order of a Collector in partition proceedings. The decision of the Judicial Committee in *Raja Sahib Perhlad v. Rajender Kishore* (7) does not militate against this view, as the order in that case was in essence made under Reg. IX of 1825. In the second place, as pointed out in *Kasturi Singh v. Rajkumar* (8) a decision under the Bengal Survey Act, relating to a boundary dispute, was conclusive as to possession only, and would not bar a suit for recovery of possession based on title. To the same effect is the decision in *Bissessuri v. Ram Purtap* (9). A similar

(1) (1866) 10 M. I. A. 311 (534).

(2) (1869) 12 M. I. A. 292 (334)

(3) (1881) 1 All. W. N. 15.

(4) (1881) 1 All. W. N. 91.

(5) (1882) 2 All. W. N. 131.

(6) (1871) 16 W. R. 271.

(7) (1869) 12 M. I. A. 292. (299); 12 W. R. P. C. 6 (18).

(8) (1904) 8 C. W. N. 876.

(9) (1909) 14 C. W. N. 366.

view had previously been adopted in *Mozuffur Ali v. Grish Chander* (1) where the three years rule was considered inapplicable to a suit for recovery of possession upon establishment of title. We are of opinion that these suits cannot be treated as barred by limitation under Art. 46, merely because when they were instituted more than three years had elapsed from the date of the order under section 41 of the Bengal Survey Act. That order has, until reversed or modified by competent authority, the force of an order of a civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. Art. 47 is equally of no avail to the appellants. That article provides that a suit by any person bound by an order respecting the possession of immovable property made under the Criminal Procedure Code, 1898, or by any one claiming under such person, to recover the property comprised in such order, must be instituted within three years from the date of the final order in the case. In respect of the land comprised in the first suit, an order under section 145 of the Criminal Procedure Code was made on the 15th May, 1912. The plaint in that suit was lodged in Court on the 14th May, 1915, as was found on an examination of the original document. There was some question as to the verification which had been made by the recognised agent of the Raja of Kakina, the first plaintiff, on the 12th May, 1915. On the 17th May, an order was recorded that the agent be permitted to sign and verify the plaint which was thereupon directed to be registered. It is obvious that the suit must be deemed to have been instituted on the date when the plaint was filed in Court and not on the date when it was ordered to be registered. There was no defect in the verification; even if there had been a defect, the Court could allow an amendment at any stage; such amendment would not have made the suit open to objection on the ground of limitation: *Rajit Ram v. Katesar* (2); *Fate Chand v. Mansab* (3); *In the matter of Biseswarnath* (4); *Basdeo v. Smidt* (5); *Molini v. Bungsi* (6). As regards the second suit which was instituted on the 24th February, 1916, the order under section 145 Criminal Procedure Code in respect of the land comprised therein was made on the 2nd June, 1913. Consequently both the suits fulfil the requirements

(1) (1868) 10 W. R. 71; 1 B. L. R. A. C. 25.

(2) (1896) 1 L. R. 18 All. 396.

(3) (1897) 1 L. R. 20 All. 442.

(4) (1917) 1 L. R. 40 All. 147.

(5) (1899) 1 L. R. 22 All. 55.

(6) (1889) 1 L. R. 17 Cal. 580.

Civil.

1921.

H. H. Maharaja of  
Cooch-Bihar

v.  
Raja Mahendra  
Ranjan.

Mookerjee, J.

## CIVIL.

1921.

H. H. Maharaja of  
Cooch-Biharv.  
Raja Mahendra  
Ranjan.

Mookerjee, J.

of Art. 47; if that article be assumed to be applicable. The objection of limitation consequently proves untenable in both its branches.

In support of the second ground, reliance has been placed upon O. 2, R. 2 Civil Procedure Code. That rule provides as follows :

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

It is plain that if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant : *Raja of Pitapur v. Suriya Rau* (1) ; *Amanat v. Imdad* (2) ; *Hanuman v. Hanuman* (3) ; *Payana v. Pana Lana* (4). In the cases before us, the two tracts of land were distinct ; it is conceivable that the claim of the plaintiff to one of the tracts might be well-founded while the other might be groundless ; and evidence appropriate for the one might not be relevant for the other : *Sonu v. Bahini-dai* (5). The parties also were not entirely indetical ; the Maharaja of Cooch-Bihar, for instance, was a party to the second suit but not to the first. The dispute as to possession had taken place at different times and the orders under section 145 had been made on different dates separated by an interval of more than one year. In such circumstances, the causes of action might reasonably be considered distinct ; they were clearly not unified by the fact that the Assistant Superintendent of Surveys included both the tracts in one order. We must look to the substance and not to the form of the proceedings ; if he had recorded his decision in separate orders, the contention of the defendants would have lost all semblance of reasonableness. It is consequently needless to

(1) (1885) L. R. 12 I. A. 116 ; I. L. R. 8 Mad. 520.

(2) (1888) L. R. 15 I. A. 106 ; I. L. R. 15 Calc. 800.

(3) (1891) L. R. 18 I. A. 158 ; I. L. R. 19 Calc. 123.

(4) (1913) L. R. 41 I. A. 142.

(5) (1915) I. L. R. 40 Bom. 351.

attempt a definition of the expression "cause of action" or a reconciliation of the decisions in *Murti v. Bhola Rām* (1) and *Bindo Bibi v. Ram Chandra* (2) where a distinction was drawn between properties held by different persons under different titles and properties held by the same person though under different titles. We are of opinion that in the case before us, the second suit is not barred under O. 2. R. 2. and the plaintiff cannot be said, in the events which have happened, to have split up one entire cause of action into different fragments.

In support of the third ground, the appellants have advanced a twofold argument, namely, first, that preference should not have been given to the thak map over the survey map, and, secondly, that the boundary line, between the villages of Sibram and Jamgram, as depicted on the thak maps produced, is incorrect. No objection, we may add, has been taken to the accuracy of the work of the civil Court amin who prepared the case map in these litigations. As regards the first branch of the contention, it is sufficient to observe that there is no inflexible rule that a survey map must have preference over a thak map. As observed in *Abid Hossein v. Dowcurry* (3) the thak and the survey maps should, as a rule, agree; where they differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other, the Court may, if it considers the thak map more reliable, follow that in preference to the survey map. This view is not opposed to the decision in *Burn v. Achumbit Roy* (4) and was approved in the cases of *Nawab Bahadur v. Gopi Nath* (5) and *Amrita Sundari v. Serajuddin* (6). In the case before us, there are solid grounds for the preference given to the thak map. The thak map of Sibram was prepared on the 25th June, 1856; the survey operations were conducted during the season 1857-58. In the interval, there was a dispute between the proprietors of the neighbouring estates as to the correctness of the boundary as delineated on the thak map. The dispute was decided by a Deputy Collector on the 14th December, 1857, when it was ordered "to confirm the thak, under which half of the flowing river (Shaniajan) appertains to this mouza (Sibram) and the other half to Jamgram." An entry to this effect was, after the decision of the dispute by the thakbast Deputy Collector, made

CIVIL

1921.

H. H. Maharaja of  
Coah-BiharRaja Mahendra  
Ranjan.

Hooker, J.

(1) (1893) 1 L. R. 16 All. 165.

(2) (1919) 1 L. R. 41 All. 583.

(3) (1900) 6 C. W. N. 629.

(4) (1873) 20 W. R. 14.

(5) (1910) 13 C. L. J. 625 (632).

(6) (1914) 19 C. W. N. 565 (576).

CIVIL.

1921.

H. H. Maharaja of  
Cooch-Bearvs.  
Raja Mahendra  
Ranjan.

Moo' erjee, J.

on the thak map. The thak proceedings and the decision of the dispute took place in the presence of the predecessors of the parties to these suits, and, consequently, that map must be treated as valuable evidence in a suit between the successors of the persons who were present. *Dunne v. Dharani Kanta* (1) which is not only in conformity with the decisions in *Collector of Rajshahys v. Doorga Soonduree* (2); *Gunga Narain v. Radhika Mohun* (3); *Omirta Lall v. Kallee Pershad* (4); *Nobo Coomar v. Gobind Chunder* (5); *Joytara v. Mahomed Mobaruck* (6) and *Abdul Hamid v. Kiran Chandra* (7), but is also in harmony with the pronouncement of the Judicial Committee in *Surja Kanta v. Sarat Chandra* (8). The decision of the revenue authorities was neither *ex parte* nor without any enquiry, as appears to have happened in the case of *Jagadindra Nath v. Hemanta Kumari* (9), and, in such circumstances, the application of an abnormally exacting test of accuracy was deprecated by the Judicial Committee in *Monmohini v. Robert Watson & Co.* (10). We cannot, consequently, give effect to the contention of the appellants that the survey map should have been preferred to the thak map. As regards the second branch of the contention of the appellants, in connection with this point, it has been urged that the boundary shown on the thak map is inaccurate and does not in fact give effect to the decision of the revenue authorities that the true boundary is neither the one nor the other bank of the river but is an imaginary line midway between the two banks. This argument seemed at one stage to have an appearance of plausibility, but, upon closer examination, turned out to be unfounded. It is negated, in fact, by the entry on the thak map which was made in the presence of the agents of the rival proprietors who had estates on the river banks. The entry is unambiguous and states distinctly that the thak boundary line was kept intact as drawn and half of the disputed river was shown as within the ambit of mouza Sibram while the other half was within the ambit of mouza Jamgram. If the boundary as delineated on the thak map was in fact incorrect, the entry would have been made in different terms. We are of opinion that there is no reasonable doubt as to the meaning of the entry and that the

(1) (1908) 1 L. R. 35 Calc. 621.

(2) (1865) 2 W. R. 210.

(3) (1873) 21 W. R. 115.

(4) (1876) 25 W. R. 179.

(5) (1881) 9 C. L. R. 395.

(6) (1882) 1 L. R. 8 Calc. 975; 11 C. L. R. 399.

(7) (1903) 7 C. W. N. 849.

(8) (1914) 20 C. L. J. 563 P. C.

(9) (1911) 14 C. L. J. 319 P. C.

(10) (1899) 4 C. W. N. 113 P. C.; 1 L. R. 27 Calc. 336.



defendants have failed to give adequate reasons why that entry should be disturbed after it had been acquiesced in by all the parties interested for such a length of time. We hold accordingly that the Subordinate Judge has rightly held that the common boundary line is that shown on the map.

In support of the fourth ground, the defendants have urged that they have acquired a good title by adverse possession for the statutory period. Here the case of the defendants is beset with grave difficulties as the major portion of the disputed lands is unculturable sandy waste. The defendants have consequently, concentrated their efforts upon two parcels *kha* and *ga*. The latter parcel is said to have been cultivated by one Masu; there is no reliable evidence however that his possession extended beyond ten years before the institution of the suit; such occupation is clearly inadequate for the purpose of acquisition of title by adverse possession. The former plot is said to have been held by one Khudu who admitted in cross-examination that the lands were submerged every year during the rainy season. In such circumstances, acquisition of title by adverse possession is impossible. In the case of *Secretary of State for India v. Krishnamoni Gupta* (1), Lord Davey referred to the decision in *Agency Co. v. Short* (2) in support of the view that land after submergence becomes derelict, and so long as it remains submerged, no title can be made against the true owner. This view was affirmed in *Kumar Basanta Ray v. Secretary of State for India* (3), where Lord Sumner observed that no rational distinction could be drawn between submergence for a few years and submergence for a few months, and that the principle enunciated in the earlier decision was applicable where the re-flooding was seasonal and occurred for several months in each year. When the land is re-submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. This view destroys the foundation of the title by adverse possession set up by the defendants. We may add that the defendants claimed title by adverse possession not always by occupation and cultivation, but sometimes also by recovery of jalkar dues and khutagiri dues; the former took the shape of levy of money or share of fish from fishermen who caught

CIVIL.

1921.

H. H. Maharaja of  
Cooch-BiharRaja Mahendra  
Ranjan.

Mookerjee, J.

(1) (1902) L. R. 29 I. A. 104; I. L. R. 29 Calc. 513. (518).

(2) (1888) 13 App. Cas. 793.

(3) (1917) L. R. 44 I. A. 104; I. L. R. 44 Calc. 258; 23 C. L. J. 487.

. CIVIL.

1921.

H. H. Maharaja of  
Cooch-BiharRaja Mahendra  
Ranjan.

Meekerjee, J.

fish in submerged areas; the latter assumed the form of a levy from boatmen who, during rainy season tied their boats to pegs driven into the bank. These acts cannot be treated as adverse possession, which, as explained by Lord Robertson in *Radhamani v. Collector of Khulna* (1), must be possession adequate in continuity, in publicity, and in extent of area, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass. To use the language of Bramwell, L. J. in *Leigh v. Jack* (2) which is quoted with approval by Lord Sumner in *Kumar Basanta v. Secretary of State* (3), to defeat a title by dispossession of the true owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it, and therefore it is necessary to look at the position in which the true owner stands towards the land as well as to the acts done by the alleged dispossessor. There is this additional difficulty in the case before us that even if the acts mentioned could be treated as acts of adverse possession, there is no evidence to show that the spots where the acts were exercised (for instance, where the fish was caught or the boats were moored) were identical from year to year. Indeed, as the land was periodically submerged, attempt at identification would be fruitless. In this connection, it is important to bear in mind that the doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the portion of the land in suit of which he proves actual possession for the statutory period; *Mohini Mohan v. Promoda Nath* (4) approved by the Judicial Committee in *Kumar Basanta v. Secretary of State for India* (3). From whatever point of view the claim of the defendants as to acquisition of title by adverse possession is approached, it is thus found to be beset with insuperable difficulties and cannot consequently prevail.

The result is that the decrees made by the Subordinate Judge are affirmed and the appeals dismissed with costs. We assess the hearing fee in F. A. 93 of 1920 at one gold mohur.

A. T. M.

*Appeals dismissed.*

(1) (1900) L. R. 27 I. A. 136; I. L. R. 27 Calc. 943.

(2) (1879) 5 Ex. Div 264 (273).

(3) (1917) L. R. 44 I. A. 104 (114); I. L. R. 44 Calc. 858; 25 C. L. J. 487.

(4) (1896) I. L. R. 24 Calc. 256.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

AGENT, B. N. W. RAILWAY COMPANY

v.

JAGANNATH AGARWALLA AND OTHERS\*

CIVIL.

1921.

August, 1.

*\*Appeal, right of—Party dismissed from record, if can appeal—Prejudice.*

A suit was brought for recovery of compensation for short delivery of goods against A and B. The suit was dismissed with costs. On a petition being filed by the plaintiff in the lower Court to make C, a party defendant in place of B, B was ordered to be removed from the record and the suit was remanded for trial *de novo*. B was given costs in the primary Court, but no cost was awarded him in the lower appellate Court. B appealed to the High Court :

*Held* that B was competent to question the propriety of the order by way of appeal even though he is not competent to question the propriety of the order in so far as it directed C to be made a party, as the order of the lower appellate Court was to deprive him of the costs allowed by the first Court.

Appeals by the Defendants.

Suit for recovery of compensation for short delivery of goods.

The material facts appear from the judgment of Mookerjee J.

*Babus Surendra Nath Guha* and *Ramendra Mohan Majumdar* for the Agent, B. N. W. Railway Company, Appellant in No. 28 and Respondent in No. 300.

*Babus Dwarka Nath Chuckerbutty* and *Tarakeswar Pal Chaudhuri* for the Respondents.

*Babu Ram Charan Mitra* for the Appellant in No. 300.

The Judgment of the Court was delivered by

**Mookerjee, J.** These appeals are directed against an order of remand made in a suit for recovery of compensation for short delivery of goods. The first defendant was the Secretary of State for India in Council representing the Eastern Bengal State Railway and the second defendant was the agent of the Bengal and North Western Railway Company. The Subordinate Judge dismissed the claim against both the defendants. As regards the first defendant he held that the loss was not due to the neglect of or theft by the servants of the Eastern Bengal State Railway. As regards the second defendant, he held on the authority of the decisions in

August, 1.

\*Appeals from Appellate Orders Nos. 258 and 300 of 1920, against the orders of Mr. Phanindra Mohan Chatterjee, District Judge of Bogra, dated the 31st May, 1920, reversing the decree of Mr. Hadratullah, Subordinate Judge of Bogra, dated the 15th February, 1919.

CIVIL.

1921.

Agent, B. N. W.  
Railway Company

Jagannath.

Meekerjee, &amp; J.

*Ram Doss v. Stephenson* (1); *Nubeen v. Stephenson* (2); *Campbell v. Jackson* (3) and *I. G. S. N. R. Co. v. Lal Mohan* (4), that the agent could not be sued as such and that the suit as against him had been improperly framed. The plaintiffs appealed against the decree of dismissal made by the Subordinate Judge. As regards the first defendant the District Judge held in concurrence with the Subordinate Judge that the plaintiffs had failed to prove negligence on the part of the Eastern Bengal State Railway. As regards the second defendant, the District Judge held, as the Subordinate Judge had done, that the suit could not be maintained against him. In this view, the District Judge should, *prima facie*, have confirmed the decree of dismissal made by the primary Court. But he proceeded instead, on the petition of the plaintiffs, to make the B. N. W. Railway Co. a party defendant in place of the agent and to remand the case for trial *de novo*. Separate appeals have been preferred against this order by the two defendants.

On behalf of the agent, the order has been attacked on the ground that the company should not have been made a party. The plaintiffs have taken a preliminary objection on the ground that as the name of the agent has been ordered to be removed from the record, he is not competent to appeal. This objection is manifestly untenable. The agent was a party to the suit and was allowed his costs by the trial Court when the suit was dismissed against him. The order of the District Judge deprives him of the costs allowed by the first Court and does not award him costs in the lower appellate Court. He has clearly been prejudiced by the order of the District Judge and is competent to question its propriety by way of appeal even though it be conceded that he is not competent to question the propriety of the order in so far as it directs the company as such to be made a party. It has not been disputed before us and in face of the authorities mentioned by the Subordinate Judge it cannot be seriously disputed that the suit as framed is not tenable against the agent. We are consequently of opinion that in the appeal preferred by the agent (A. A. O. No. 258 of 1920) the proper order to make is to allow the appeal and to direct that the suit as against the agent be dismissed with costs in all the Courts.

On behalf of the Secretary of State the order of the District Judge has been assailed on the ground that in view of the concur-

(1) (1868) 10 W. R. 366.

(2) (1871) 15 W. R. 534.

(3) (1885) 1 L. R. 12 Calc. 41.

(4) (1915) 22 C. L. J. 241.

rent finding of two Courts that there has been no negligence on the part of the Eastern Bengal State Railway, the suit as against him should have been dismissed; and that even if the suit should be tried *de novo*, against the newly added defendant B. N. W. Railway Co., he should not be put to further expense in connection with proceedings which cannot possibly affect him. There is plainly no answer to this argument. We are consequently of opinion that in the appeal preferred by the Secretary of State (A. A. O. No. 300 of 1920) the proper order to make is to allow the appeal and to direct that the suit as against the Secretary of State be dismissed with costs in all the Courts.

We assess the hearing fee in this Court at two gold mohurs in each appeal.

The result of our decision will be that the only residue of the order of the District Judge which will remain operative will be the order that the B. N. W. Railway Co. be made a party defendant and that the suit be tried against them *de novo* by the primary Court. This order, it may be noted, was made by the District Judge without notice to the B. N. W. Railway Co., and we need not consider at this stage what objections the company may urge if and when the plaintiffs proceed with the suit as against them.

A. T. M.

*Appeals allowed.*

## CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

JAMINIBALA DEBI,

*v.*

KARALI PRASAD MUKHERJEE\*.

*Appeal—Order in execution of Small Cause Court decree transferred to ordinary Court—Civil Procedure Code (Act V of 1908), Sec. 47—Party—Defendant.*

An order in execution of a Small Cause Court decree passed by a Small Cause Court Judge, is final. *Raj Kumar Lal v. Bulaki* (1) and *Alagawuthu v. Devasagaya* (2). But, when the decree has been transferred to the ordinary

\* Civil Rule No. 414 of 1921, against the order of P. E. Cammiade Esq., District Judge of Burdwan, dated the 6th May, 1921, affirming that of Babu Satya Prasanna Majumdar Munsif, Burdwan, dated the 26th April, 1921.

(1) (1917) 3 Pat. L. W. 146.

(2) (1916) Mad. L. T. 146.

CIVIL.

1921.

Agent, B. N. W.  
Railway Company.

*v.*

Jagannath.

Mookerjee, J.

CIVIL.

1921.

August, 24.

**CIVIL.**

1921.

Jaminibala Debi  
v.  
Karali Prasad.

Court to be executed as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in execution of decrees passed by that Court, although a second appeal would be barred under section 102 of the Code of Civil Procedure : *Atwari v. Maiku Lal* (1) referred to.

Although a Court expressed an opinion that A, the widow of a deceased debtor, was not a proper party in a suit by the creditor against the heirs, because she was not one of the heirs, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the immovables of the estate. On this basis the suit was tried against her and she succeeded on the merits :

*Held*, that A was a party to the suit within the meaning of section 47 of the Code of Civil Procedure. An objection raised by her to the attachment of properties covered by the conveyance executed in her favour by the deceased debtor, was comprehended within the scope of section 47 ; the decision of such a question operated as a decree under section 2 of the Code and was appealable in the same manner as other decrees under section 96.

Application for Revision by the Objector.

- Application for execution of decree.

The material facts appear from the judgment.

*I abu Jyotis Chandra Pal* for the Petitioner.

*Babu Narendra Krishna Bose* for the opposite Party.

The judgment of the Court was delivered by

**Mookerjee J.** — We are invited in this Rule to set aside an order of refusal of a District Judge to hear an appeal on the ground that no appeal lay, inasmuch as the order of the Court of first instance was made in the course of proceedings in execution of a decree made by a Court of Small Causes.

It appears that on the death of one Bhabadeb Bhutta his creditor Karali Prasad Mukherjee instituted a suit against his three infant sons and his widow. The claim was based as against the sons on the ground that they were the legal representatives of the deceased debtor and as against the widow on the ground that she had taken possession of the movables which formed part of the estate left by the deceased. The suit, which was instituted in a Court of Small Causes, was decreed against the infant sons, but was dismissed as against the widow because she was not proved to be in possession of the movables of the estate. The judgment of the Small Cause Court Judge states that as the widow was not a heir, she was not a necessary party, but for the reason that she was alleged to be in possession of a portion of the assets left by the deceased debtor. The suit was thus not dismissed against the widow on the ground that she was not a necessary party ; it was tried on the merits

(1) (1908) 1 L. R. 31 All. 111

August, 24.

against her and was decided in her favour, because the allegation that she was in possession of the movable of the estate was not established by the evidence. This decree was transferred to the Court of the Munsiff for execution by attachment and sale of the immovable properties left by the deceased debtor. This order of transfer was made under section 39 Civil Procedure Code in view of the provisions of order 21 rule 82 that an attachment of immovable property cannot be effected by a Court of Small Causes. When the immovable properties were attached, the widow appeared and objected on the ground that she had acquired good title thereto under a conveyance from her husband dated the 23rd January 1919. This objection was registered as a case under section 47 Code of Civil Procedure. There was a regular investigation and the Court came to the conclusion that the objection was not sustainable. The widow thereupon preferred an appeal to the District Judge. The District Judge has refused to entertain the appeal on the ground that no appeal lay inasmuch as the decree under execution had been passed by a Court of Small Causes. This view is clearly erroneous.

Section 27 of the Provincial Small Cause Courts Act is in these terms : "Save as provided by this Act, a decree or order made under the foregoing provisions, of this Act by a Court of Small Causes shall be final." The orders thus made final are orders made by a Court of Small Causes ; so that if this decree had been executed by the Court of Small Causes itself, the order in execution would have been final ; *Raj Kumar Lal v. Bulaki* (1) ; *Alagamuthu v. Devasagya* (2). When however, the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders, made in execution are appealable in the same way as orders made in execution of decrees passed by that Court ; this is in accordance with the view adopted in *Atwari v. Maiku Lal* (3), although a second appeal would be barred under section 102 Code of Civil Procedure. We hold accordingly that the ground assigned by the District Judge in support of his order of refusal to entertain the appeal cannot be upheld.

It has been argued, however, that the appeal preferred to the District Judge was incompetent, because the order was made, not under section 47, but under order 20, rule 58 of the Code. In our opinion, this contention is not well founded. The explanation to section 47 of the Code provides that for the purposes of the section a plaintiff whose suit has been dismissed and a defendant against

CIVIL.

1921.

Jaminibala Debi

v.

Karali Prasad.

Mookerjee, J.

(1) (1917) 3 Pat. L. W. 146.

(2) (1916) Mad. L. T. 146.

(3) (1908) I.L.R. 31 All. 1.

CIVIL.

1921.

Jaminibala Debi

Kareli Prasad.

Mookerjee, J.

whom a suit has been dismissed are parties to the suit. This explanation was inserted in view of the divergence of judicial opinion which had prevailed under the Code of 1882. Under that Code it had been held by the Allahabad High Court in *Kalka v. Basant* (1); *Sheo Purgash v. Nawab* (2) and by this Court in *Rahimuddin v. Loll Meah* (3), and *Ram Pershad v. Jagannath* (4), that the plaintiff whose suit had been dismissed and the defendant against whom a suit had been dismissed could not be considered as parties to the suit. On the other hand, the Madras High Court had held in *Ramaswami v. Rameswaramma* (5), that such a plaintiff and such a defendant must be regarded as parties to the suit; see also *Gowri v. Viganeshwar* (6). The present Code gives effect to the view taken in the Madras decision and the widow must consequently be deemed a party to the suit, even though the suit was dismissed as against her. We are not unmindful that it has been ruled in the case of *Krishnappa Mudaly v. Periaswamy Mudaly* (7) and *Shamlal Sahu v. Amar Prasad Chaudhury* (8), that the explanation does not apply to a case where a suit has been dismissed against a person on the ground of mis-joinder of parties, as in such an event, it cannot be appropriately said that that person is a party to the suit. The decision in *Krishnappa v. Periaswamy* (7), was however not followed in *Mediseti v. Kunchala* (9), and *Vaddadi v. Koduganti* (10), and cannot be reconciled with *Abdul v. Thambuswami* (11) and *Venkatachella v. Murthialu* (12). The present case is, plainly, not affected by this conflict of judicial opinion in Madras. Here although the opinion was expressed that the widow was not a proper party because she was not one of the heirs of the deceased debtor, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the movables of the estate. On this basis, the suit was tried against her and she succeeded on the merits. We must consequently hold that she was a party to the suit within the meaning of section 47 Code of Civil Procedure. Consequently the objection raised by her to the attachment of the properties covered by the conveyance executed in her favour by her husband, was rightly treated by the Court of first instance as comprehended within the scope of section 47, the decision of such a question operates as a decree under section 2 Civil Procedure

(1) (1901) I. L. R. 23 All. 3, 6.

(2) (1919) I. L. R. 32 All. 321.

(3) (1902) I. L. R. 29 Calc. 696.

(4) (1902) I. L. R. 30 Calc. 134.

(5) (1899-1900) I. L. R. 23 Mad. 361.

(6) (1892) I. L. R. 17 Bom. 49.

(7) (1916) I. L. R. 40 Mad. 964.

(8) (1917) 2 Pat. L. J. 219.

(9) (1917) 23 M. L. T. 306.

(10) (1917) I. L. R. 41 Mad. 418.

(11) (1917) M. W. N. 93.

(12) (1919) 37 M. L. J. 624.



Code and is appealable in the same manner as other decrees under section 96, Civil Procedure Code.

The result is that the Rule is made absolute and the case returned to the District Judge in order that he may proceed to hear the appeal. The petitioner is entitled to the costs of this Rule—one gold mohur.

A. T. M.

*Rule made absolute.*

CIVIL.

1921.

Jaminibala Debi

v.

Karali Prasad.

Mookerjee, J.

## APPELLATE CIVIL

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

ABDUL HOSSAIN AND OTHERS

v.

AFSARUDDIN AND OTHERS.\*

CIVIL.

1921.

July, 19.

*Tenant—Encroachment—kabuliat—Rent to be paid for encroached land—Land, if to be annexed against the wishes of landlord,*

If a tenant encroaches upon the adjoining waste of his landlord, the latter is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser, he is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. If he treats him as a tenant, then he becomes liable to pay additional rent; *Ishan v. Ramranjan* (1) followed.

A *kabuliat* in favour of the landlord contained the following: "If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that survey, whether lying inside or outside the boundaries mentioned in the *kabuliat* and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the *kabuliat* have been enjoyed secretly".

*Held*, that the clause did not entitle him to annex the adjoining land and retain possession thereof against the wishes of the landlord.

Appeal by the Plaintiffs.

\* Letters Patent Appeal No. 39 of 1919, against the decree of Mr. Justice Walmsley, dated the 10th February, 1919, in Appeal from Appellate Decree No. 811 of 1917, reversing that of C. P. Hogg Esq., District Judge of Tipperah, dated the 31st March, 1917, reversing that of Babu Rajendra Lal Sadhu, Munsiff of Comilla, dated the 24th July, 1916.

(1) (1905) 2 C. L. J. 125.

## CIVIL.

1921.

Abdul Hossain

v.

Afsaruddin,

## Suit for ejectment.

The disputed land was claimed both by the plaintiffs and the defendants as tenants under the same landlord. On the 10th October, 1912, the defendants executed a kabuliat in favour of the landlord in respect of a defined area. On the 12th January, 1914, the plaintiffs executed a kabuliat in favour of the same landlord, also in respect of a defined area. The primary Court came to the conclusion that the land was comprised within the tenancy of the defendants and dismissed the suit. The appellate Court came to the conclusion that the land was comprised within the tenancy of the plaintiffs and accordingly decreed the suit. On second appeal, Mr. Justice Walmsley held that under the terms of the kabuliat the landlord was bound to recognise the defendants as his tenants of the land of which they had taken possession immediately to the south of the land demised to them, and, therefore, he was not in a position to lease the same land to the plaintiffs. The suit was therefore dismissed. The following judgment was delivered by

1919.

February, 10.

**Walmsley J.**—The plaintiffs who are now respondents brought the suit to recover possession of a small piece of land. They failed in the first Court but on appeal they were successful. About the land comprised in schedule gha (ঘ) there is now no dispute. The appeal relates to the land comprised in schedule N. It appears that the defendants took settlement from the landlord in Aswin 1319. The boundary of the land on the south was described as *khas patit*. In Pous of the following year the plaintiffs took settlement from the same landlord. In their potta the northern boundary was given as land comprised in the jote of the defendants, so that the question relates to the boundaries on the south of the defendant's land and on the north of the plaintiff's land. The learned Munsiff, as I have said, found in favour of the defendants. In appeal the question which appears to have been argued before the learned Judge was simply whether the land lay inside the defendant's boundary or not and the decision of the lower appellate Court was that it did not lie within the defendant's boundary and was not part of the land demised to them. In that finding it decreed the suit. The defendants have now preferred this appeal and the argument which is pressed before me is this that the finding of the first Court that the defendants were in possession of the schedule N land before the settlement with the plaintiffs has not been displaced by the lower appellate Court and that from that possession an implied tenancy may be inferred, more especially, in view of the words contained in the

potta to the defendants, namely, এই কবুলিয়তের লিখিত চৌহদ্দীর বাহিরে কি ভিতরে অতিরিক্ত যে কছমের যত জমিতে আমার দখল সাব্যস্ত হইবেক তাহার খাজনা তৎকালীন দার্য্য নিরীখে দিয়া বন্দোবস্ত করিয়া লইব। It appears to me that this argument must prevail. The first Court found that possession was with the defendants, and the same view underlies the remarks made by the learned Judge. That being so, on the terms of the potta it appears to me clear that the landlord was bound to recognize the defendants as his tenants of the land of which they had taken possession immediately to the south of the land demised to them, and, therefore, he was not in a position to lease the same land to the plaintiffs; and it follows from that that the plaintiffs cannot recover possession of the land from the defendants. In this view I allow the appeal and dismiss the plaintiffs' suit so far as the land comprised in schedule N is concerned with costs of the appeal in this Court and with proportionate costs in the lower Court.

Against this decree, the plaintiffs appealed under clause 15 of the Letters Patent.

*Babu Upendra Kumar Ray* for the Appellants.

*Babus D. L. Khastgir and Biraj Mohan Mojumdar* for the Respondents.

The judgment of the Court was delivered by

**Mockerjee J.**—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for ejectment. The disputed land is claimed both by the plaintiffs and the defendants as tenants under the same landlord. On the 10th October 1912, the defendants executed a kabulyat in favour of the landlord in respect of a defined area. On the 12th January 1914, the plaintiffs executed a kabulyat in favour the same landlord, also in respect of a defined area. The case for the plaintiffs was that the land in dispute was comprised within the boundaries of their tenancy and that the defendants had unlawfully kept them out of possession thereof. The defendants resisted the claim on the ground that the land was comprised within the ambit of their tenancy and that as their tenancy was earlier in point of time the plaintiffs had acquired no valid title thereto. The Court of first instance came to the conclusion that the land was comprised within the tenancy of the defendants and dismissed the suit. Upon appeal the District Judge came to the conclusion that the land was comprised not within the tenancy of the defendants but within the tenancy of the plaintiffs and accordingly decreed the suit. On

CIVIL.

1921.

Abdul Hossain.

Afsaruddin.

Walmsley, J.

CIVIL

1921.

Abdul Hossain

v.

Afsaruddin.

Moharjee, J.

second appeal to this Court it was contended that by virtue of the terms of the kabulyat of the defendants they had acquired a good title to the disputed land as tenants even though it was situated beyond the ambit of their tenancy. In support of this position reliance was placed upon the following clause in the kabulyat : " If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that survey, whether lying inside or outside the boundaries mentioned in the kabulyat and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the kabulyat have been enjoyed secretly." The contention of the defendants respondents is that the effect of this clause is to entitle them to encroach upon the adjoining waste of the landlords and thereby to create a tenancy in their own favour in respect of such lands, even against the wish of the landlord. In our opinion, this contention cannot possibly be sustained. It was pointed out by this Court in the case of *Ishan Chandra v. Ramranjan* (1), that if a tenant encroaches upon the adjoining waste of his landlord, the landlord is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser, the landlord is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. If the landlord treats him as a tenant, then he becomes liable to pay additional rent. The object of the clause in question was to make the tenant liable to pay additional rent for additional area, should it be discovered upon measurement that he had secretly taken possession of such land as was not comprised within the ambit of his tenancy. The clause did not entitle him to annex the adjoining land and retain possession thereof against the wishes of the landlord. We are unable to hold that anything had happened between the 10th October 1912 and 12th January 1914 which made it impossible for the landlord to grant a tenancy in respect of the disputed land to the plaintiffs.

The result is that this appeal is allowed, the judgment and decree of Mr. Justice Walmsley set aside and those of the District Judge restored. This order will carry costs both here and before Mr. Justice Walmsley.

A. T. M.

*L. P. Appeal allowed : Suit decreed.*

(1) (1905) 2 C. L. J. 125.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.

MOKBUL ALI SADAGAR

v.

BASARAT ALI AND OTHERS\*

CIVIL.

1921.

July, 20.

*Ejectment—Revenue Sale Law (Act XI of 1859) Sec 37—‘Settlement’—Contract  
with Government—Bajeapti taluq.*

The word ‘settlement’ in section 37 of the Revenue Sale Law refers not to the Permanent Settlement of 1793 but to the contract with Government. *Raj Chunder v. Shaikh Busheer* (1) followed. In the case of a *Bajeapti* taluq, the contract with Government is made when revenue is assessed thereon and is transformed into revenue paying estate liable to be sold for its arrears.

Appeal by the Plaintiff.

Suit for ejectment on the basis of title acquired by purchase at a sale for arrears of revenue held under Act XI of 1859.

The *Bajeapti* taluq purchased by the plaintiff was made an entire estate in 1844. At that time the lands comprised in the taluq were subject to the *etmami* tenure set up by the defendants, which was found to be in existence in 1837. The Courts below dismissed the plaintiff’s suit for *khas* possession. On second appeal the decree was affirmed by the following judgment of

**Newbould, J.**—The plaintiff in this suit claimed as purchaser of a dartaluki right to certain land, his vendor having obtained a lease from the purchaser of a *bajeapti* taluk, at a sale for arrears of revenue. He sued the defendant for establishment of his title to and recovery of possession of the land in suit. He obtained a decree declaring his dartaluki right to the land in suit; but his prayer for *khas* possession was disallowed. Plaintiff’s case is that the land in suit was held by the defendant No. 1 as a raiyat and that he abandoned this raiyati right in favour of the plaintiff and that consequently the plaintiff is entitled to *khas* possession. The findings of both the lower Courts are that the defendant No. 2 had *etmami* right to the land and that that *etmami* right was not annulled by the revenue sale. It is found that the *bajeapti* taluk was created in 1844 but the *etmami* right was in existence, at any rate, in 1837. It is con-

1920.  
May, 10.

\*Letters Patent Appeal No. 45 of 1920 against the decree of Mr. Justice Newbould, dated the 10th May, 1920, in Appeal from Appellate Decree No. 12675 of 1919, against the decree of Babu Rajendra Lal Sadhu, Additional Subordinate Judge of Chittagong, dated the 2nd June, 1919, affirming that of Babu Aswini Kumar Das, Munsiff, 1st Court, at Satkania, dated the 19th February, 1918.

(1) (1875) 24 W. R. 476.

•CIVIL.  
 1921.  
 Mokbul  
 v.  
 Basarat.  
 Newbould, J.

tended that this finding is insufficient and that in order to make the tenure exempted from annulment under section 37 of Act XI of 1859 the Court should have found that this *etmami* had been in existence from the time of the Permanent Settlement. In support of this contention reliance is placed on the case of *Nagendra Lal Chowdhury v. Nazir Ali* (1). It does not appear from the findings of the lower Court whether this *etmam* is covered by the first or the second of the exception clauses to section 37; but the point does not seem to be really material. If it is covered by the first exception and is an *istimrari* or *mukurari* tenure then, as in the case which I have first cited, the facts now found are sufficient to justify the presumption that the tenure existed from the time of the Permanent Settlement. If, however, the *etmami* tenure is one which has not been held at fixed rent, then the finding that it was in existence at the time of the settlement of the *bajeapti* taluk in 1844 is sufficient to make this exception applicable.

This appeal was argued at considerable length. The other point urged was that the evidence did not justify the findings of the lower Courts on the facts. It was suggested that there had been misconstruction of documents in coming to these findings; but there is no question of construction of documents in this case. A finding of fact based on documentary evidence or an inference drawn from documentary evidence is as much binding in second appeal as a finding of fact based on oral evidence.

The appeal fails and is dismissed with costs.

Against this decree, the plaintiff appealed under clause 15 of the Letters Patent.

*Babu Narendra Kumar Das* for the Appellant.

*Babu Probodh Kumar Das* for the Respondents.

The judgment of the Court was delivered by

July, 20.

**Mookerjee, J.**—This is an appeal by the plaintiff in a suit for ejectment on the basis of title acquired by purchase at a sale for arrears of revenue held under Act XI of 1859. The *Bajeapti* taluq purchased by the plaintiff was made an entire estate in 1844. At that time the lands comprised in the taluk were subject to the *etmam* tenure set up by the defendants, which, it has been found, was in existence in the year 1837, that is, before the creation of the taluq in the year 1844. In these circumstances, the question arises whether the plaintiff is entitled to eject the defendants under section 37 of

(1) (1906) 10 C. W. N. 503.

Act XI of 1859, which provides as follows : " The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptions :—First, *Istemrari* or *mokrari* tenures which have been held at a fixed rent from the time of the permanent settlement ; secondly, tenures existing at the time of settlement which have not been held at a fixed rent : provided always that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures. On behalf of the plaintiff appellant, the argument has been put forward that the expression " After the time of settlement " means " After the time of the permanent settlement of 1793. " In our opinion, this contention is not well founded. The section taken as a whole makes it abundantly clear that a distinction is drawn between the settlement of the estate which is brought to sale and the permanent settlement of 1793. The two expressions are not identical. This was pointed out by Mr. Justice Macpherson in the case of *Raj Chunder Chowdhry v. Shaikh Busheer Mahomed* (1), where he observed as follows : " We think that the Judge is wrong in the construction which he has put upon the word ' Settlement ' in the first paragraph of section 37 of Act XI of 1859. The word as there used refers not to the permanent settlement but to the settlement which took place after resumption by Government of the lands previously held as *lakheraj*. That this is so, is evident when the whole of the section is read together ; and where the permanent settlement is referred to, namely, in the first of the exceptions immediately following the words ' permanent settlement ' are used. " This exposition of the law was adopted in the case of *Kootwar Singh v. Gour Sunder Pershad Singh* (2), where it was held that the term settlement means the contract with Government whenever that may have been made. In the case then before the Court the original estate had been created in 1793, and had been subsequently partitioned under the Partition Act, so that the original entire estate was broken up into a number of independent estates. It was held that each of these new estates was an entire estate such as was contemplated by Act XI of 1859 ; and, further, that as the partition did not alter the amount of revenue payable but merely apportioned that amount, each

CIVIL.

1931.

Mokbul

v.

Basirat.

Mookerjee, J.

(1) (1875) 24 W. R. 476. (2) (1897) 1 L. R. 24 Calc, 887.

CIVIL.

1921.

Mokbul

Basarat

Mootedjee, J.

fragment of the original estate must be deemed to have been created a permanently-settled estate in 1793; that is, when the contract with Government was first made. See also *Tamasha v. Ashutosh* (1). In the case before us, there is no room for doubt or dispute that the contract with Government in respect of the *Bajeapte* taluq was first made in 1844, when revenue was assessed thereon and it was transformed into a revenue paying estate liable to be sold for its arrears. This view is really not opposed to the decision in *Nagendra Lal Chowdhury v. Nazir Ali* (2). We hold accordingly that the view taken by Mr. Justice Newbould as to the construction of section 37 of Act XI of 1859 is correct.

If this interpretation be adopted, the plaintiff cannot possibly succeed. No doubt, the incidents of an *etmami* tenure, which were investigated by this Court in *Joges v. Mokbul* (3), have not been determined by the lower appellate Court, and it has not been found whether the *etmam* set up by the defendants is covered by the first or the second of the exceptions to section 37; but this is immaterial. If it is covered by the first exception and is an *istimrari* or *mokurari* tenure, then, as in the case of *Nagendra Lal Chowdhury v. Nazir Ali* (2), the facts found would justify a presumption that the tenure existed at the time of the permanent settlement. On the other hand, if the *etmam* is one which has not been held at fixed rent, then the finding that it was in existence at the time of the original settlement of the *Bajeapte* taluq in 1844 is sufficient to make the second exception applicable. In either view, the interest of the defendants cannot be annulled by the plaintiff and the suit has been rightly dismissed. The appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1909) 4 C. W. N. 513.

(2) (1906) 10 C. W. N. 503.

(3) (1920) 25 C. W. N. 857.



*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

BYOMKES SETH AND ANOTHER

v.

BHUT NATH PAL AND OTHERS\*

*Appeal.—Decree in favour of a party, if can appeal—Letters Patent, cl. (15)—Order passed in the exercise of revisional jurisdiction—Order, if to be passed with jurisdiction.*

A party cannot appeal against a decree in his favour, solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree.

An appeal under clause 15 of the Letters Patent does not lie from an order made in the exercise of revisional jurisdiction, whether such order was or was not made with jurisdiction.

*Appeal by the Plaintiffs.*

The plaintiffs instituted a suit for rent valued less than Rs. 50 in the Court of the Munsiff, having power to exercise final jurisdiction under section 153 of the Bengal Tenancy Act. The suit was dismissed. This decree was reversed on appeal. The second appeal, against the decree was dismissed but the decree was reversed on revision by the following judgment of

**Newbould, J.**—This appeal arises out of a decision in a suit for arrears of rent. The amount claimed did not exceed Rs. 50 and the suit was decided by a Munsiff who was empowered by the Local Government to exercise special jurisdiction under section 153 of the Bengal Tenancy Act. The Munsiff dismissed the suit. On appeal that decision was reversed and the suit was decreed.

The question that now arises is whether an appeal lay to the lower appellate Court. The plaintiff claimed the land as part of his putni. The defendant alleged that the land was not included in the plaintiff's putni but in a Government khas mehal. The Subordinate Judge held that in dismissing the suit the Munsiff had decided a question relating to title to the land between parties having conflicting claims thereto.

It is contended that as the defendant set up the right of Govern-

\* Letters Patent Appeal No. 22 of 1920, against the decree and order of Mr. Justice Newbould, dated the 2nd February, 1920, in Appeal from Appellate Decree No. 758 of 1919 with Civil Rule No. 87 (5) of 1919 reversing the decree of Babu Bhagabati Charan Kundu, Subordinate Judge, 4th Court, 24 Perganas, dated the 4th March, 1919, reversing that of Babu Sarada Kumar Sen Gupta, Munsiff, 1st Court, at Sealdah, dated the 20th December, 1917.

1920.

1921.

CIVIL.

1921.

July, 22.

1920.

February, 2.

• CIVIL.

1921.

Byomkes

Bhut Nath.

Newbould J.

ment and Government was no party to the suit, no question had been decided relating to title as between parties having conflicting claims. In my opinion this contention is right. It has been repeatedly held by this Court that when the defence is set up that rent is payable not to the plaintiff, but to a third person and that person is no party to the suit the decision in the rent suit does not decide a question relating to title to the lands between parties having conflicting claims thereto. [See the case of *Doorga Narain Sen v. Ram Lal Chhutar* (1) and the case of *Dena Bandhu Nandi v. Nobin Chundra Kur* (2)].

It is contended on behalf of the respondent that in this case the defendant did not admit that he held the land under Government but claimed proprietary right. It is true that in his written statement he has described himself as the proprietor. But on reading the written statement as a whole, his contention is clearly seen to be that the land formed part of a khas mehal which is the property of Government and that he held the land as a tenant under Government. Paragraph 9 refers to the property as the Khas Mehal property of Government. In paragraph 4 the defendants state that they have been informed and believe that the land described in the plaint constitutes holding No. 184, sub-division 16, grand division 1 in Dehi Punchannogram which was recorded in the register of the Collector of the 24 Purganahs Khas Mehal for upwards of 40 years in the name of Bolai Chand Dutta, the grandfather and predecessor in interest of Benode Behari Dutta; that is the defendant No. 1 whose interest was purchased by defendants Nos. 2 to 4. They clearly did not set up a right independent of the Government right and the decision of the Munsiff that the land was part of the Government khas mehal was not a decision which could render his decree the subject of an appeal under section 153.

I must therefore hold that the Subordinate Judge acted without jurisdiction in reversing the decision of the Munsiff and decreeing this suit. It also follows that the decision of the Subordinate Judge is not open to appeal to this Court. Though there may be cases as shown in *Kalipada Karmakar v. Shekhar Basini Dasya* (3) in which section 153 Bengal Tenancy Act does not prevent an appeal from the decision of the appellate Court though no appeal lay from the first Court, this is not one of them. The learned Subordinate Judge held that the defendants were estopped from raising the question of title and the remarks in his judgment on the merits of their

(1) (1881) 1. L. R. 7 Calc. 330.

(2) (1903) 8 C. W. N. 437.

(3) (1916) 24 C. L. J. 255.

claim were not a decision of the question relating to title. The result is that the appeal must be dismissed and the Rule made absolute the decree of the lower appellate Court is set aside and that of the Court of first instance restored.

I make no order as to costs in this appeal and in the Rule.

Against this decree and order, the plaintiffs appealed under clause 15 of the Letters Patent.

*Babus Dwarka Nath Chuckerbutty and Baranashibasi Mukerji* for the Appellants.

*Dr. Dwarka Nath Mitter, Babus Kshitish Chandra Chuckerbutty and Narayan Chandra Kar* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee, J.**—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould passed in the exercise of revisional jurisdiction.

A suit for rent was instituted by the appellant in the Court of the first Munsiff at Sealdah in the district of 24-perganas. The claim was contested and the suit was dismissed. An appeal was thereupon lodged in the Court of the Subordinate Judge of 24-Perganas. The appeal was heard on the merits and the decision of the trial Court was reversed. Against the decree of the Subordinate Judge two proceedings were instituted in this Court; one was an appeal from appellate decree; the other was an application for revision, on the basis whereof a Rule was issued by this Court. The common question which was argued before Mr. Justice Newbould in both these proceedings was, whether an appeal lay to the Subordinate Judge from the decision of the primary Court. It was urged that as the amount claimed did not exceed Rs. 50 and as the suit was decided by a Munsiff who was empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act his decision could not be challenged by way of appeal to the Subordinate Judge. Mr. Justice Newbould came to the conclusion that the appeal from appellate decree presented to him was incompetent, because the Subordinate Judge had not determined by his decree any of the special questions mentioned in section 153 of the Bengal Tenancy Act which would justify an appeal to this Court. In this view, the appeal from appellate decree was dismissed as incompetent. In the Rule Mr. Justice Newbould came to the conclusion that the decree of the Subordinate Judge must be discharged as made without jurisdiction. His

CIVIL.

1921.

Byomkes

Bhut Nath.

Newbould, J.

July, 22.

CIVIL

1921

Byomkes

v.  
Bhut Nath.

Mookerjee, J.

view of the proceedings in the trial Court was that no such special questions had been decided there as would entitle the party aggrieved to maintain the appeal before the lower appellate Court. From this standpoint, he made the Rule absolute, set aside the decree of the Subordinate Judge and restored the decree of the Court of first instance.

The present appeal under the Letters Patent purports to be directed against the decree of dismissal made in the appeal from appellate decree as also against the order for reversal made in the Rule. As regards the decree of dismissal made in the appeal from appellate decree, it is clear that the appellant is not entitled to maintain the appeal. That decree is in his favour and he cannot appeal against a decree in his favour, solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree. In reality, the appeal under the Letters Patent is directed against the order made in the Rule.

A preliminary objection to the appeal has been taken on behalf of the respondent, that the appeal is incompetent by virtue of the amendment made in 1919 in clause 19 of the Letters Patent. The relevant portion of the Letters Patent as amended is in the following terms: "And we do further ordain that an appeal shall lie to the High Court of Judicature at Fort William in Bengal from a judgment (not being an order made in the exercise of revisional jurisdiction) of one judge of the said High Court." There can be no doubt that the order made by Mr. Justice Newbould is a judgment within the meaning of clause 15 of the Letters Patent. The question is, is it an order made in the exercise of revisional jurisdiction? If the answer be in the affirmative, no appeal lies under clause 15 of the Letters Patent against such order. On behalf of the appellant, the argument has been advanced that an appeal lies to enable the appellant to show that the order which purports to have been made in the exercise of revisional jurisdiction was made without jurisdiction. We are of opinion that this contention is not well-founded.

We are not unmindful of the decision of the judicial Committee in the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Deba* (1), where the following observation occurs: "Their Lordships do not think that Mr. Justice Pontifex can be properly treated as having usurped jurisdiction; but if he had, this would have been a valid ground of appeal and they are unable to agree with the Chief Justice that if a Judge of the High Court makes an order under misapprehension of the extent of his jurisdiction, the High Court has no

(1) (1882) L. R. 10 F. A. 4; I. L. R. 9 Calc. 482.

power by appeal or otherwise to set right such a miscarriage of justice". This pronouncement was made in 1882, long before the amendment of the Letters Patent in 1919. The terms of the Letters Patent as amended are perfectly clear and we are not prepared to accept the contention of the appellant that the only orders made in the exercise of revisional jurisdiction which are made non-appealable by the Letters Patent are orders made with jurisdiction. The orders which are made non-appealable are, in our opinion, all orders made in the exercise of revisional jurisdiction and an appeal cannot be maintained to test whether an order which purports to have been made in the exercise of revisional jurisdiction was or was not made without jurisdiction. To adopt the contrary view, would be to substitute the expression "Order made with jurisdiction in the exercise of revisional jurisdiction" for the expression "Order made in the exercise of revisional jurisdiction." We are fortified in this view when we recall the history of the law on the subject.

It is well known that before this amendment was made, there had been a considerable divergence of judicial opinion upon the question whether an appeal was allowed under the Letters Patent against orders made in the exercise of revisional jurisdiction. The trend of opinion, which was by no means uniform, in the High Courts of Calcutta and Madras was in favour of the right of appeal. Reference need be made to the cases, among others, of *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (1); *Debendra Nath Das v. Bibudhendra Mansingh* (2), *Jalan v. Assaram* (3); *Peary Lall v. Banamali* (4); *Bajinath v. Jung Bahadur* (5); *Chappan v. Moidin Kutti* (6); *T. V. Tuljaram Row v. M. K. R. V. Alagappa Chettiar* (7) and *R. Srinivasa Iyengar v. S. K. M. R. M. Ramaswami Chettiar* (8). A contrary view was indicated in the cases of *Hiralal v. Bai Asi* (9) and *Nisar Ali v. Ali Ali* (10). It was to remove this divergence of judicial opinion that the Letters Patent was amended and the amendment gives effect to the opinion that an appeal should not lie from orders made in the exercise of revisional jurisdiction. The order made by Mr. Justice Newbould was unquestionably made in the exercise of revisional jurisdiction; whether he exercised that jurisdiction when he should not have

CIVIL.

1921.

Byomkes

v.

Bhut Nath.

Mookerjee, J.

(1) (1913) I. L. R. 41 Calc. 323.

(3) (1912) 22 C. L. J. 22.

(5) (1915) 22 C. L. J. 113.

(7) (1910) I. L. R. 35 Mad. 1.

(9) (1897) F. L. R. 22 Bom. 891.

(2) (1915) I. L. R. 43 Calc. 90.

(4) (1911) 22 C. L. J. 40.

(6) (1898) I. L. R. 22 Mad. 68.

(8) (1913-1915) I. L. R. 39 Mad. 235.

(10) (1905) I. L. R. 28 All. 133.

CIVIL.

1921.

Byomkes

v.

Bhut Nath.

Mookerjee, J.

exercised it, is a matter which cannot be investigated by way of an appeal.

We may add that reliance was placed upon the decision of this Court in the case of *Bandiram Mukerjee v. Purno Chunder Roy* (1), to show that when a decree has been made without jurisdiction, an appeal lies against it, precisely in the same manner as if it had been made with jurisdiction. But this doctrine is of no assistance to the appellant; an appeal lies against a decree made without jurisdiction, because a decree so made possesses all the qualities of a decree under the Civil Procedure Code. On the other hand the analogy may well be invoked to support the view that an order made in the exercise of revisional jurisdiction is an order so made, even if it has been made without jurisdiction.

• We are, accordingly, of opinion that the present appeal is incompetent and must be dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1917) 1. L. R. 45 Calc. 926; 27 C. L. J. 115.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr. Justice Panton.*

CIVIL.

1921.

July, 15.

RAM KANAI PAL AND OTHERS

v.

PUNNA CHANDRA (alias) JOGESWAR PODDAR AND OTHERS.\*

*Decree—Attachment, if valid—Attachment of decree before it is drawn up.*

When a person has the judgment of the Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time: *Mugniram v. Gursahai* (1) referred to.

Appeal by the Petitioners.

Application by assignees of decree for substitution of their names.

The material facts appear from the judgment.

\* Appeal from Order No. 217 of 1919, against the order of Babu S. N. Guha, Officiating Subordinate Judge, 2nd Court of Dacca, dated the 12th May, 1919.

(1) (1889) 1. L. R. 17 Calc. 347; L. R. 16 I. A. 195.

*Dr. Sarat Chandra Basak and Babu Debendra Chandra Pal* for the Appellants.

*Babus Gunada Charan Sen and Sarat Chandra Dutt* for the Respondents.

The judgment of the Court was as follows :

This appeal is against an order directing the respondents to be substituted as attaching decree-holders under the following circumstances.

It appears that one Mathura Nath Poddar obtained a preliminary decree in a suit brought by him for partition against his co-sharers. Under the judgment in that case, the plaintiff Mathura Nath obtained certain immovable properties in his share and was held entitled to certain sums of money (as owelty money) from 5 persons. This judgment was passed on the 18th December 1917. There was considerable delay in drawing up the decree. As a matter of fact, the decree was not drawn up and signed until the 9th December 1918. After the judgment had been delivered, the respondents applied for attachment of the money portion of the decree, and notice of attachment was issued on the 2nd October 1918. It was returned on the ground that the decree had not been prepared at that time. An application was made again on the 25th November 1918 by the respondents for attachment of the decree. On the next day the 26th November, the Court sent the notice of attachment and this time the notice was kept on the file in order that the decree might be attached after it was made. On the next day, 27th November, the judgment-debtor Mathura Nath assigned all his interest in the subject matter of the suit including the moneys which Mathura Nath was to get from his five co-sharers to Ram Kanai Pal and others, the appellants before us. The decree was not prepared and signed until the 9th December 1918.

The assignees Ram Kanai Pal and others applied for being substituted in the place of Mathura Nath. The respondents Sananda Chandra Pal and others also applied for being substituted as attaching creditors and they contended that, as attaching creditors, they were entitled to have preference over the assignees. They also impugned the assignment itself as not being *bona fide*.

The Court below held that the attachment was valid and directed the respondents to be substituted as attaching decree-holders. The assignees appealed to this Court, and the case was remanded to the Court below for a finding as to the *bona fides* of the assignment

Civil .

1921.

Ram Kanai

v.

Punna Chandra.

July, 15.

CIVIL.

1931.

Ram Kanai.

v.  
Punna Chandra.

in favour of Ram Kanai Pal and others. The Court below has come to the finding that the assignment was a *bona fide* one.

The first question for consideration therefore is, whether there was a valid attachment of the decree prior to the assignment in favour of Ram Kanai Pal and others. It is contended on behalf of the appellant that under section 60 of the Civil Procedure Code, it is only saleable *property* (with certain exceptions) which can be attached, that order 21, rule 53 says that where the *property* to be attached is a *decree*, it shall be attached in a particular manner, that the ordering portion of a judgment merely states the conclusion at which the Court arrives and is not a decree, and that so long as the decree is not drawn up and signed there is no decree which can be attached. But the final judgment in the partition suit was passed on the 18th December 1917, under that judgment Mathura Nath became entitled to certain properties and to certain sums of money (as owelty money) from the defendants; the judgment not only gave the conclusions arrived at by the Court, but also gave directions. He therefore obtained the decree on that day, though the formal decree was drawn up and signed later on.

In the case of *Mugniram Marwari v. Gursahai Nand* (1), certain proceedings taken by the guardian of a minor were sought to be set aside on the ground that the minor had not been properly represented by the guardian, as the certificate of guardianship had not been issued to him though the Court had appointed him guardian. The Judicial Committee observed (See pages 356-357). "Their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to show that he is the person who should have the certificate. He then, by getting that order, substantially obtains the certificate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for some time afterwards, on account of the course of business, or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree.

(1) (1889) 1 L. R. 17 Calc. 347; L. R. 16 L. A. 195.



The decree, when it is drawn up afterwards, relates back to that time ; and so would the certificate in this case relate back ; and the terms of the Act that he shall have obtained such certificate are complied with." We think the observations may be applied to this case.

Civil.  
1921.  
Ram Kanai  
v.  
Punna Chandra.

Under order 20 rule 7 of the Civil Procedure Code the decree is to bear the date of judgment, though the decree may be signed subsequently. It is true that the decree-holder has to pay stamp duty under the Stamp Act before the decree can be drawn up. But upon the payment of the stamp the decree is drawn up and signed. When it is signed it relates back to the date of the judgment. The decree therefore is in existence on the date of the judgment except for certain purposes (such as the computation of the period of limitation prescribed for an appeal which is to be computed from the date on which the decree is signed). We think therefore that there was a decree in favour of Mathura Nath in the ordering portion of the judgment though the formal decree was not drawn up and signed until the 9th December 1918 after the necessary stamp duty was paid. It may be mentioned here that the conveyance obtained by the assignees themselves professed to transfer the *decree*, and the rights and interests of the judgment-debtor in partition suit.

It is next contended on behalf of the appellants that the decree obtained by Mathura Nath was for immovable properties as well as for certain sums of money, and the notice having directed attachment of the decree (i. e., the whole decree), and the attachment having been made accordingly, was bad because the procedure for attachment of a decree other than a decree for money or a mortgage decree, is different and was not followed. But the decree-holders applied for attachment only of the money portion of the decree, and they do not claim any right on the basis of attachment of any other portion of the decree. The notice in so far as it directed the attachment of the other portion of the decree and the attachment of the other portion of the decree no doubt must be treated as ineffectual, but that does not affect the attachment of the decree in so far as it awarded certain sums of money to Mathura Nath.

The attaching decree-holders however claimed the monies payable to Mathura Nath by three only out of the five judgment-debtors. The Court below was therefore wrong in directing the attaching decree-holders to be substituted in respect of the decree which directed the payment of monies by the judgment-debtors (meaning

CIVIL.

1921.

Ram Kanai  
Purna Chandra

thereby all the judgment-debtors) to Mathura Nath. The order of the Court below will therefore be varied by ordering that the attaching decree-holders will be substituted in respect of the decree in so far as it directs payment of the sums by Gopal Chandra Poddar, Rai Mohan Poddar, and Kali Kumar Poddar (now represented by Kamini Kumar Poddar and Akshoy Kumar Poddar) to Mathura Nath, and that the assignees Ram Kanai Pal and others will be entitled to be substituted in respect of the rest of the decree. In other respects the order of the Court below will be confirmed. No order as to costs.

A. T. M.

*Decree varied.*

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr.  
Justice Panton.*

PABAN KHAN

v.

BADAL SARDAR.\*

CIVIL.

1921.

July, 26.

*Attesting witness—Scribe—Document, execution of—Evidence Act (I of 1872),  
Secs. 68, 70.*

An attesting witness to a document is a witness in whose presence the document is executed.

A scribe by reason of his having signed the name of the executant on the document on his behalf, is not a competent attesting witness: *Rajani v. Panchananda* (1) followed.

Proof of execution of a document required to be attested by calling one attesting witness under section 68 of the Evidence Act, is not required under section 70 where the execution of the document is admitted by the executant.

Appeal by the Plaintiff.

Suit on a mortgage bond.

The material facts appear from the judgment.

*Babu Nalin Chandra Pal* for the Appellant.

\* Appeal from Appellate Decree No. 2605 of 1919, against the decree of K. K. Sen Esq., Officiating Additional District Judge of Khulna, dated the 9th September, 1919, reversing that of Babu Jogendra Kumar Das, Additional Munsiff of Khulna, dated the 18th November, 1918.

(1) (1918) 23 C. W. N. 290.

*Babu Samatul Chandra Dutt* for the Respondent:

The judgment of the Court was as follows :

This appeal arises out of a suit upon a mortgage-bond.

The defendant admitted the execution of the bond but pleaded payment and satisfaction of it. He also raised the defence that the bond should not be regarded as a mortgage bond.

The Court of first instance held that the execution of the bond not being challenged, the necessity of its proof did not arise. That Court over-ruled the other pleas of the defendant and gave a decree to the plaintiff.

On appeal by the defendant, the learned Additional District Judge was of opinion that the provisions of section 59 of the Transfer of Property Act had not been complied with. He held that the scribe having executed the deed on behalf of the appellant was not competent to attest his own signature, and there being no other evidence, allowed the appeal and dismissed the suit.

It has been contended on behalf of the plaintiff, who is the appellant before us that, having regard to the provisions of section 70 of the Evidence Act, there was no necessity for calling any attesting witness under section 68 of the Act; and reliance was placed upon the cases of *Satis Chandra Mitra v. Jogendra Nath Mahalanabis* (1) and *Nibaran Chandra Sen v. Ram Chandra Sen* (2).

In those cases, however, the only question related to proof of execution of the mortgage bond. No question was raised before, or decided by, this Court, in either of the two cases as to validity of the mortgage-bond with reference to the provisions of section 59 of the Transfer of Property Act. The two questions are different, one being the question of proof of execution of a document required to be attested by calling one attesting witness under section 68 of the Evidence Act, which, however, is not required, where the execution of the document is admitted by the executant as laid down in section 70 of the Evidence Act. The other question relates to the validity of the mortgage even though the document might be proved according to law. This distinction does not appear to have been kept in view in the Court below: and although the question of the validity of the mortgage bond was set up in the written statement and put in issue, the Court of first instance, at any rate, does not appear to have appreciated the distinction between the two.

It appears that the mortgage bond, on the face of it, contained

(1) (1916) I. L. R. 44 Cal. 345; 20 C. W. N. 1044; 24 C. L. J. 175.

(2) (1917) 22 C. W. N. 444.

CIVIL.

1921.

Paban

v.

Badal.

July, 26.

CIVIL.

1921.

Paban

Badal.

the names of 4 attesting witnesses of whom two were illiterate and the scribe of the deed says that he put down the names of those illiterate witnesses at their request. It is not clearly stated, however, whether they were attesting witnesses in the sense that the document was executed in their presence. There were however two other witnesses who signed their own names and although the scribe by reason of his having signed the name of the executant on the document on his behalf is not a competent attesting witness as laid down in the case of *Rajani Kanta Bhadra v. Panchananda* (1) there are, as stated above, other persons whose names appear as attesting witnesses in the document. Under the circumstances, the plaintiff should be given an opportunity of producing evidence to show that the document was executed in the presence of attesting witnesses so as to satisfy the requirements of section 59 of the Transfer of Property Act. This however must be on terms, as the point was taken in the written statement.

We accordingly direct that upon the plaintiff appellant paying to the defendant respondent all the costs incurred up to this stage within a fortnight of the arrival of this order in the Court of appeal below, that Court will allow the plaintiff an opportunity of adducing evidence to show that the document was properly attested within the meaning of section 59 of the Transfer of Property Act and then dispose of the case according to law. The Court of appeal below may direct the Court of first instance to take fresh evidence under O. 41 R. 28.

If the aforesaid costs are not paid within the time specified, the appeal will stand dismissed with costs.

A. T. M.

*Appeal allowed: Case remanded.*

(1) (1918) 23 C. W. N. 290.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.  
Justice Panton.*

SATIS CHANDRA DAS AND OTHERS

v.

UMES. NARAIN CHAUDHURI AND OTHERS.\*

CIVIL.

1921.

July, 21.

*Deposits—Bengal Tenancy Act (VIII of 1885), sections 61, 62—One tenancy—  
Deposits for three tenancies—Deposits accepted by Court—Landlord, if can  
question validity of deposits.*

If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, the deposits are not valid within the meaning of section 61 of the Bengal Tenancy Act. The landlord can question their validity, although they were accepted by the Court under section 62: *Sasi v. Umahant* (1) distinguished.

Appeal by the Defendants.

Suit for recovery of arrears of rent.

The primary Court dismissed the suit. This decree was reversed by the lower appellate Court. On second appeal it was confirmed by the following judgment of

**Newbould J.**—This appeal arises out of a rent suit. There is no dispute about the total rent payable; but the plaintiffs' case is that the amount is due for a single jama. Defendants say it is the total of three jamas. The finding of the lower appellate Court is that there were three jamas which were consolidated into one jama long ago. That is a finding of fact which is final in second appeal. It is contended that in coming to this conclusion the lower appellate Court has misconstrued *Ext. C*—a judgment of 1896. This does not appear to be so. As the learned Subordinate Judge points out, that judgment shows that the defendant's case is inconsistent since in 1886 they admitted that two of the three jamas had been consolidated whereas they now deny that any of them was so consolidated; whereas, on the contrary, the plaintiffs' case throughout has been consistent since then and on different occasions he has always treated these three jamas as consolidated. Whether upon these facts an inference can be drawn that the jamas have been consolidated is not a question of law.

1920.

May, 17.

\* Letters Patent Appeal No. 50 of 1920, against the judgment of Mr. Justice Newbould, dated the 17th May, 1920, in Appeal from Appellate Decree No. 663 of 1919, against the decree of Babu Rajendra Lal Sadhu, Additional Subordinate Judge of Pabna, dated the 6th January, 1919, reversing that of Babu Kesab Chandra Sen, Additional Munsiff of Pabna, dated the 20th April, 1918.

(1) (1914) 20 C. L. J. 153.

## • CIVIL.

1921.

Satis

v.

Umes.

Newbould, J.

The next point urged is that the deposit of rent made by the defendants should have been treated under section 62 of the Bengal Tenancy Act as an acquittance for the amount due. The finding of the lower appellate Court reversing that of the first Court is that the defendants were not justified by section 61 in making a deposit. There was no tender; so clause (a) could not apply. On the finding that the three jamas had been consolidated into one the defendants could have no reason to believe that their tender would be refused or a receipt withheld; and so clause (b) could not apply, clause (c) and clause (d) are obviously inapplicable. But it is contended that even though a tenant may not be authorized by section 61 to make a deposit of rent, yet if that deposit is accepted by the Court under section 62 the right to deposit cannot subsequently be called in question. In support of this contention the case of *Sasi Bhusan Dey v. Umakant Dey* (1) is cited. But that was a case dealing with the question of an insufficient deposit and not of a deposit by a tenant who had no right to make it under section 61.

The appeal fails on both the points urged and is dismissed with costs.

Against this judgment, the defendants appealed under clause 15 of the Letters Patent.

*Babus Sarat Chandra Rai Chaudhuri and Priya Sankar Mazumdar* for the Appellants.

*Babu Krishna Kamal Maitra* for the Respondents.

The judgment of the Court was delivered by

July, 21.

**Mookerjee J.**—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould in an appeal from an appellate decree in a suit for recovery of arrears of rent. The question in controversy was, whether there was a valid deposit of rent under section 61 of the Bengal Tenancy Act prior to the institution of the suit. The Court of first instance answered in favour of the defendants and dismissed the suit. Upon appeal, the Subordinate Judge reversed that decision and his decree has been confirmed by Mr. Justice Newbould.

It appears that the defendants at one time held under the plaintiffs three distinct tenancies. The plaintiffs have instituted the present suit for recovery of rent due in respect of the lands comprised in all the three tenancies on the allegation that the tenancies had been amalgamated and now constituted, in reality, only one tenancy. The defendants pleaded that the tenancies were distinct and that on this footing they had, prior to the institution of the suit, made

(1) (1914) 20 C. L. J. 153.

three deposits in Court in respect of the three alleged distinct tenancies. It was found by the Subordinate Judge, contrary to the decision of the Court of first instance, that the three tenancies had been amalgamated, and we are of opinion that Mr. Justice Newbould has correctly held that the question whether the three tenancies had or had not been amalgamated was a question of fact dependent for its decision upon evidence which could not be considered by this Court in second appeal. We must, consequently proceed on the assumption that at the date of the institution of the suit there was only one tenancy. This raises the question whether the deposits had been validly made and furnished an answer to the claim.

Mr. Justice Newbould has found that none of the conditions precedent to the application of sub-section (1) of section 61 has been proved to exist. But it has been urged here on behalf of the defendants, appellants, that the case may be brought within clause (b) as the tenants had on a previous occasion, though many years ago, tendered rent which had been refused and had consequently reason to believe that rent, if tendered on the present occasion, might meet with the same fate. We shall not pause to examine whether this view is or is not plausible, for even if we assume, that the case comes within clause (b) of sub-section (1) of section 61, it is clear that the defendants cannot succeed. The section contemplates that the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due. If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, it cannot be maintained that this is a deposit within the meaning of section 61. But it has been argued that once a deposit has been made and has been accepted by the Court under section 62, it is not open to the landlord to question its validity. In support of this proposition, reliance has been placed upon the decision in *Sasi Bhusan Dey v. Umakant Dey* (1). That case however is clearly distinguishable. It was there held that where the amount deposited was less than the amount due, the deposit operated as a part payment of the debt due to the landlord, inasmuch as sub-section (2) of section 62 provides that a receipt given by the Court operates as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid, in the same manner and to the same extent as if that amount of rent had

(1) (1914) 40 C. L. J. 153.

CIVIL.

1921.

Satis

v.

Umca.

Mookerjee, J.

CIVIL.

1921.

Satis

v.

Mookerjee, ?.

been received by the landlord. If a tenant unconditionally offers money to the landlord, even though the amount tendered may not cover the entire arrears due, the landlord is bound to accept it in part satisfaction of his dues. The case before us is however of a different description. Here the deposits which are said to have been made, were, strictly speaking, made not in respect of the one tenancy held by the plaintiffs, but in respect of three tenancies which were no longer in existence as distinct tenancies but had been amalgamated into one tenancy. We are of opinion that there was no valid deposit and the suit has been rightly decreed. The appeal is consequently dismissed with costs.

A. T. M.

*Appeal dismissed.*

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.  
Justice Chotsner.*

CIVIL.

1921.

August, 10.

RAJA SASI KANTA ACHARJYA BAHADUR

v.

SANDHYA MONI DASYA AND ANOTHER.\*

*Presumption—Entry in record-of-rights—Non-agricultural land—Bengal Tenancy Act (VIII of 1885), Sec 103 (B) Sub-sec. (3).*

If an entry has been made in the record-of-rights with regard to land which does not come within the scope of the Bengal Tenancy Act, and with regard to which the revenue officer had no jurisdiction to make the entry, the presumption under section 103 B (3) of the Bengal Tenancy Act is not of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights.

Appeals by the Plaintiff.

Suit for khas possession of disputed lands.

The material facts appear from the judgment of the learned Chief Justice.

*Babu Gobinda Chandra Dey Roy* for the Appellant.

\**Dr. Sarat Chandra Basak* and *Babu Annonda Charn Karkun* for the Respondents.

\* Appeals from Appellate Decrees Nos. 1777 and 2047 of 1919, against the decrees of E. Milsom Esq, and Additional District Judge of Mymensingh, dated the 31st July, 1919, affirming those of Babu Atul Chandra Banerjee, Munsiff, 3rd Court, at Mymensingh, dated the 22nd July 1918.



The judgments of the Court were as follows :

**Sanderson C. J.**—This is an appeal from the judgment of the learned second Additional District Judge of Mymensingh ; and, the suit was brought for the purpose of obtaining *khas* possession of the lands in dispute.

The defendant in one case was Brindaban Chandra De Sarkar, and the defendant in the other case was his wife ; and, it has been found that she was a *benamdar* for her husband, and the two cases have been treated as if Brindaban was the occupier of both the pieces of land.

The first Court dismissed the suit : and, upon appeal to the lower appellate Court, decision of the first Court was upheld, and the appeal was dismissed.

The case raises a point of considerable interest, inasmuch as the record-of-rights which was published in February 1918 described the character of the holding in each case as *Chandina*, an expression which in this part of the district was, apparently prior to the entry in the record-of-rights, unknown. There was a considerable discussion as to what was the meaning of the word, but the learned Additional Judge for the purpose of his judgment said that he was prepared to hold, though with a certain amount of doubt, that the view urged by the plaintiff was correct, namely that by *Chandina* the settlement authorities meant *basar* land not subject to the provisions of the Bengal Tenancy Act.

The first point, that the learned vakil for the appellant has urged, is based upon section 103 B (3) of the Bengal Tenancy Act which provides that "Every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect" : and, the argument was to the effect that the learned Judge in the lower appellate Court had ignored that section and held that in this case the entry in the record-of-rights created no presumption. The words of the learned Judge may be cited : he said, "whatever land is dealt with by the settlement authorities as falling under the Tenancy Act, the Law says that the various entries made are to be presumed correct until the contrary is shown. But I know of no authority for the view that if the settlement authorities decide that the land is not held under the Tenancy Act at all, the view should be deemed correct." My learned brother and I have had some difficulty in understanding how this entry came to be made by the revenue officer if the word "*Chandina*" is to be taken to bear the meaning which the

CIVIL. °

1921.

Raja Sesi Kant

v.

Sandhya Mani  
Daiya.

August, 10.

CIVIL.

1921.

Raja Sasi Kanta

Sandhya Moni  
Dasya.

Sanderson &amp; Co. J.

learned Judge in the lower appellate Court put upon it. If the revenue authorities understood that it meant *basar* land which was not subject to the provisions of the Tenancy Act at all, it is difficult to understand why they entered it upon the record-of-rights which was made in connection with lands which are subject to the Tenancy Act. The explanation of it may be that the revenue officer had not then the advantage which the two lower Courts had, of the discussion as to what the word really meant, and the entry may have been made under a misapprehension as to the real meaning. However that may be, the entry was made, and there it stands; and, the question is whether the learned vakil for the appellant is right when he says that a presumption must be made that this description of the holding is correct until evidence is given to prove the contrary.

• Dr. Basak, the learned Vakil for the defendant, has contended that the learned Judge was right in holding that no presumption arose for the reason that section 102 of the Bengal Tenancy Act describes the particulars which are to be recorded in the record-of-rights. It describes the classes of tenants with which the record-of-rights is to deal; and, for the purpose of seeing what classes of tenants are to be dealt with he referred especially to clause (b) of section 102, and he urged that it is only with regard to what I might call proper entries i. e., the entries which ought to be made and could be made in accordance with the provisions of the Bengal Tenancy Act that the presumption which is referred to in section 103 B (3) would arise. No authority directly upon this question has been cited to us, and consequently it is not unreasonable to assume that the learned Judge was correct when he said "I know of no authority for the view that if the settlement authorities decide that the land is not held under the Tenancy Act at all, the view should be deemed correct." The only authority, in any way touching the question, which was cited to us, is the case of *Bipradas Pal Choudhury v. Azam Ostagar* (1), a decision of my learned brother Mr. Justice Woodroffe and Mr. Smither when he was acting as a Judge of this Court. There Mr. Justice Woodroffe, said, "The Legislature contemplated I think that only three classes of tenants should be regarded as holding lands within the meaning of the Bengal Tenancy Act, viz., a tenure-holder who has been held to mean a person collecting rents from raiyats, holding lands for the purpose of cultivation and under-raiyats holding under them." Again he said, "There seems to me no doubt that in its

(1) (1918) I. L. R. 46 Calc. 441.

general scope the Bengal Tenancy Act is law for agricultural land-lords and tenants." Basing his argument upon that, the learned vakil for the defendant has supported his proposition that if an entry has been made in the record-of-rights with regard to land which does not come within the scope of the Bengal Tenancy Act and with regard to which the revenue officer had no jurisdiction to make the entry, no presumption arose under section 103, B (3) of the Bengal Tenancy Act. I am not prepared to go so far as to say that in this case no presumption arose from the entry in the record-of-rights, but I am prepared to say that the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. In this case, the first Court went so far as to hold that the entry was clearly wrong. Upon that point the learned Judge in the lower appellate Court has not expressed any definite opinion, as I understand, because he came to the conclusion that no presumption ought to be drawn from the entry. But he discussed the evidence and came to the conclusion that if he had to rely upon the statement of the defendant alone he would have had difficulty in finding in favour of the defendant. He however, drew attention to the fact that the plaintiff was a landlord with large possessions and it was an extraordinary thing that the papers which would have shown the origin and the nature of the tenancy had not been produced. That was the point upon which the first Court relied to a large extent, and held that the non-production of these papers is to be regarded as a matter which must weigh heavily against the plaintiff's case. Taking that together with the evidence of the defendant, the learned Judge in the lower appellate Court came to the conclusion as I read his judgment that the defendant had proved that the statement in the record-of-rights was rebutted and that the lands in question were either *jote* lands or homestead lands. Consequently, the first point, in my judgment, which the learned vakil for the appellant urged is not sufficient to justify us in allowing this appeal or even in directing a remand.

Then there was a further point which the learned vakil raised. He urged that the facts were not sufficiently found by the learned Judge in the lower appellate Court. He referred to the finding that the lands must be taken either as *jote* lands or as homestead lands and that the finding that the lands are homestead lands, by itself, is not sufficient, because in order to bring them within the purview of the Bengal Tenancy Act that must be homestead lands occupied either in connection with agriculture and for purposes of

CIVIL.

1921.

Raja Sasi Kanta

Sandhya Moni  
Dasya,

Sanderson, C. J.

CIVIL.

1921.

Raja Sasi Kanta

Sandhya Moni  
Dasya.

Sanderson, C. J.

agriculture. In my judgment, although the learned Judge's words are not quite as definite as they might have been, reading the judgment as a whole I have no doubt that the learned Judge meant to find and did find as a matter of fact that the lands were agricultural lands and that the homestead was used in connection with agriculture to some extent. I come to that conclusion upon the words of the judgment itself and I am fortified in that conclusion by the finding of the first Court that the defendant actually used these lands partly for shop and partly for raising crops. Under those circumstances, the finding of the lower appellate Court is sufficiently definite: and, I think that the learned Judge found that the holdings were not *Chandani* but that they were holdings which came within the purview of the Bengal Tenancy Act, and consequently the plaintiff was not entitled to a decree for possession in accordance with the claim which he preferred.

The result is that in my judgment for the reasons that I have given the appeal should be dismissed with costs.

The other appeal will follow the event of this appeal, and it is accordingly dismissed with costs.

Chotzner J.—I agree.

A. T. M.

*Appeals dismissed.*

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Richardson.*

BHUBANESWAR BHATTACHARJEE

CIVIL.

1921.

July, '21.

DWARAKESWAR BHATTACHARJEE AND OTHERS.\*

*Limitation—Limitation Act (IX of 1908), Schedule I., Arts. 62, 109, 120—Suit by one co-sharer landlord against another for share of rent collected.*

Article 120, and not articles 62 and 109, schedule I of the Limitation Act, is applicable to a suit by a co-sharer landlord against another for a share of the rent collected in the supposed right by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly.

\* Appeal from Appellate Decree No. 1794 of 1919 with Rule No. 186 of 1919, against the decree of Babu Bijoy Gopal Chatterjee, Additional Subordinate Judge of Howrah, dated the 19th June, 1919, modifying that of Babu Sasi Jiban Sen, Munsiff, Second Court, at Uluberia, dated the 8th February, 1918.

Appeal by defendant No. 3, co-sharer landlord.

Suit for rent.

The material facts appear from the judgment of Richardson, J.

*Babus Girija Prosonna Roy Choudhuri* and *Sisir Kumar Ghosal* for the Appellant and the Petitioner.

*Babus Manmatha Nath Ray* and *Asi Ranjan Chatterjee* for the Respondents and the Opposite Party.

The judgments of the Court were as follows :

**Richardson, J.**—This is a second appeal in a suit for rent. Plaintiffs Nos. 1 to 3 and defendant No. 3 are co-sharer landlords under whom defendants Nos. 1 and 2 are tenants in respect of a certain holding. The plaint concludes with the following prayers “(a) That a decree may be passed against the principal defendants (meaning defendants Nos. 1 and 2) for Rs. 213-14 annas in claim and all costs of the suit together with interest up to the date of realization; and (b) that in case it be proved that the *pro forma* defendant No. 3 has realized any paddy, etc., due to the plaintiffs from the defendants, then a decree may be passed for the said sum together with damages and costs as against the *pro forma* defendant No. 3 on placing him in the category of principal defendants by amending the plaint.”

There is a further prayer for general relief with which we are not concerned.

The rent claimed directly from defendants Nos. 1 and 2 and indirectly from defendant No. 3 was due for the years 1320 and 1321. I should also mention that the claim was for the money value of rent payable in kind.

Both the Courts below have concurred in finding that by far the greater part of the rent due for the two years was in fact collected by the defendant No. 3. The result is that the alternative claim against defendant No. 3 has been the principal subject of controversy throughout.

In the trial Court the learned Munsiff held that the claim against defendant No. 3 in respect of the year 1320 was barred by limitation under Art. 62 of the Limitation Act. That article applies to suits for “money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff’s use” and the period of limitation is three years from the date when the money is received. The Munsiff gave the plaintiffs a decree against defendant No. 3 for their share of the rent for 1321 collected by that defendant. The plaintiffs appealed and the learned Subordinate Judge while he took practically the same view of the case on the merits was of opi-

CIVIL.

1921.

Bhubaneswar

Dwarakeswar.

July, 12.

CIVIL.

1921.

Bhubaneswar

Dwarakeswar.

Richardson, v.

nion that the claim against defendant No. 3 in respect of the year 1320 was governed not by article 62 but by the residuary article 120 under which the period of limitation is six years from the time when the right to sue accrues. The decree of the Subordinate Judge, therefore, makes the defendant No. 3 liable to the plaintiffs for their share of the rent of both years.

The appeal before us is preferred by the defendant No. 3 and discussion has turned mainly on the question of limitation. It has been conceded that on the facts found below the defendant No. 3 has no defence so far as the claim against him relates to the year 1321. As regards the claim for the year 1320 the learned vakil for the defendant No. 3 has given us a number of articles to choose from. He contends that if article 62 does not apply, then the article applicable is either article 48 or article 49 or article 109. The period of limitation under all these articles is three years counting from a date which would make the plaintiffs out of time. The learned vakil for the plaintiffs on the other hand has argued that the lower appellate Court was right in applying article 120.

In my opinion, the claim in question is not a claim for specific movable property within the meaning of article 48 or article 49. The difficulty about article 62 is that as that article is worded, it does not seem to be applicable to a claim in respect of rent collected by the defendant No. 3 in kind and in point of fact the case for the defendant No. 3 was rested mainly on article 109.

Article 109 applies to a suit "for the profits of immovable property belonging to the plaintiffs which have been wrongly received by the defendant." The article is in every day use in the class of suits which it primarily contemplates, namely suits for mesne profits against a trespasser. The defendant No. 3 is not a trespasser and without saying that the question is free from all difficulty, I very much doubt whether the article can have any application at all to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly. It is said that it must be inferred from the findings of fact arrived at by the Courts below that the defendant No. 3 received the rent wrongfully. That is not the very meritorious argument urged on behalf of the defendant No. 3. It is true that the Courts below have found that the defendant No. 3 put pressure on the tenants to pay their rent to him. It is also true that the defendant No. 3 set up in defence to the suit an arrangement between himself and the plaintiffs under which the latter were to take the entire rent for a certain period and then he was to take

the entire rent for another period, a defence which has been rejected. But this negative conclusion does not necessarily lead to the positive conclusion that at the time the defendant No. 3 collected the rent, he intended to defraud his co-sharers. The pleadings suggest a quarrel between co-sharers as to which of them should have the right to collect the rent due to all and as to the state of the accounts between them. At any rate, the applicability of article 109 does not seem to have been suggested in the Courts below so that those Courts were given no opportunity to apply their minds to the precise question raised before us, whether as between himself and the plaintiffs the defendant No. 3 received the rent "wrongfully" within the meaning of the article.

The defendant No. 3 did not implead the defendants Nos. 1 and 2 as respondents to this appeal. On behalf of the plaintiffs however notice was given to the defendants Nos. 1 and 2 to appear at the hearing so that if necessary the plaintiffs might claim over against them. These defendants now ask for their costs. In my opinion regard being had to the result their costs should be paid by the plaintiffs. The plaintiffs will get their costs of the appeal from the defendant No. 3 and the defendants Nos. 1 and 2 will get their costs of to-day's hearing from the plaintiffs, the hearing-fee in the case of the defendants Nos. 1 and 2 being assessed at one gold mohur.

The Rule brought up with the appeal is discharged without costs.

**Sanderson, C J**—I agree that the appeal should be dismissed and the Rule discharged and I agree also with the order as to costs as stated by my learned brother.

A. T. M.

*Appeal dismissed : Rule discharged.*

CIVIL.

1921.

Bhubaneswar

Dwarakeswar.

*Richardson, J.*

# APPELLATE CRIMINAL

*Before Mr. Justice Newbould and Mr. Justice Ghose.*

CRIMINAL.

1921.

September, 27, 28.

HARI CHARAN DAS AND OTHERS

v.

KING-EMPEROR.\*

*Jury trial—Misdirection—Charge, essentials of—Reference to argument of defence pleader.*

In judging the charge to the jury one cannot say that there has been misdirection because every point in favour of the accused has not been put to the jury. The charge must be judged as a whole and one must see whether judging it as a whole, the case for the two sides had been fairly put, so that the jury can understand what they have to decide and come to a right conclusion.

It is not necessary for the Sessions Judge to repeat every thing that has been said by the pleader for the defence in his speech. But he should draw the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence. A mere reference to the argument of the pleader is insufficient.

Appeal by the Accused under section 410 of the Code of Criminal Procedure.

The accused, six in number, were convicted of rioting and sentenced under section 147 of the Indian Penal Code to two years rigorous imprisonment.

On the 23rd November 1920, when in the morning, Noyan Mistri and his brother were cutting paddy in a land of theirs, a large number of men, including the seven accused in the dock, came armed with various weapons. The accused Hari Charan Das claimed the land as his auction-purchased land and after giving orders to beat, himself struck Kripa on his right knee-joint with a spear. Kripa fell down and cried aloud. Then the accused party beat Nayan also. Their cries brought on the scene many persons who were close by and the accused party dispersed. One of the seven accused was acquitted by the Sessions Judge.

*Babus Dasarathi Sanyal and Hemendra Kumar Das for the Appellants.*

*Mr. Orr for the Crown.*

The judgment of the Court was as follows :

The appellants have been convicted of rioting and sentenced

\*Criminal Appeal No. 457 of 1921, against the order of S. Banerji, Esq., Additional Sessions Judge of Sylhet, dated the 14th July, 1921.

September, 28.



under section 147 of the Indian Penal Code to two years rigorous imprisonment each. There can be no doubt that on the 23rd of November last a serious fight took place between the appellants on one side and the principal prosecution witnesses in this case on the other. Men of both parties were separately sent up for trial on charges of rioting and other offences. The trial of some men of the complainant's party resulted in their acquittal and the trial of 7 men of the appellant's party resulted in the acquittal of one of the seven and the conviction of the others as stated above.

From the portions of the evidence that have been read to us there seems to be very little doubt that what really happened was a mutual fight between the two parties, very probably pre-arranged. But in reporting the matter to the police both parties tried to make out a case of pure aggression by the other side. According to the accused the occurrence took place at or near what is described as Atkayari plot and the actual beating is said to have taken place at a point marked 'A' in the police map exhibit 3. According to the prosecution the occurrence took place at a spot marked "a" in the map about half a mile to the east of the other plot. Every thing seems to point to the real occurrence having taken place at neither of these places. The jury, however, have expressly found that the occurrence took place at the spot where the prosecution witnesses say it did. It is contended and we think fairly contended that in coming to this conclusion the jury were not properly directed by the learned Sessions Judge. Several points in favour of the case for the appellants have been put to us by the learned pleader who has appeared before us for them. But we do not propose to deal with these points seriatim. In judging the charge to the jury one cannot say that there has been misdirection because every point in favour of the accused has not been put to the jury. The charge must be judged as a whole and one must see whether judging it as a whole, the case for the two sides had been fairly put so that the jury can understand what they have to decide and come to a right conclusion. What we find in the present charge is that it was never suggested to the jury that both the case for the prosecution and the case for the defence might be false. To exemplify this we may take one of the several points urged. In his comments on the evidence of the investigating police officer, the learned Judge remarks "He (the investigating police officer) did not see any marks of struggle &c on any of the spots where the occurrence is located by either side and in their vicinity". In the first place there is a positive misdirection in saying that the investigating

CRIMINAL.

1921.

Hari Charan

v.

King-Emperor.

CRIMINAL,

1921.

Hari Charan  
 vs  
 King-Emperor.

officer found no marks of struggle in the vicinity of the place of occurrence as pointed out by the appellants. Both the map and his evidence show that marks were found in plots marked II and III which are very near to the plot marked "A". What we think is more serious in this connection is that the evidence of the investigating officer that he found marks of occurrence at other places than those alleged by the two parties plots 'A' and 'a' was not put to the jury. One cannot but think that if this view of the case had been put to the jury it was very unlikely that they would have come to the finding that the place of occurrence was that described by the prosecution. There are several other matters which make it extremely improbable that that part of the prosecution story is true. Some of these have been put to the jury in the charge. But they have been put more from the point of view that the jury had to consider whether the place of occurrence was at "a" or 'A' and not from the point of view whether the prosecution had succeeded in proving the place of occurrence at 'a' and not anywhere else.

Also we cannot entirely approve of the manner in which the learned Sessions Judge has dealt with the discrepancies and contradictions in the statements of the prosecution witnesses in his charge. He referred the jury to the speech of the learned pleader for the defence. It is not necessary for him to repeat every thing that has been said in such a speech. But he ought to have drawn the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence. A mere reference to the argument of the pleaders was insufficient.

Taking the charge as a whole we are not satisfied that the issue before the jury was properly understood by them. Taking this view we cannot uphold the conviction and we do not think, having regard to all the circumstances of the case, that any useful end would be served by ordering a retrial. We accordingly allow this appeal and set aside the conviction of the appellants and direct that their bail bonds be discharged.

A. T. M.

*Appeal allowed : Conviction set aside.*

*Before Mr. Justice Newbould and Mr. Justice Ghose.*

AINUDDI CHOWKIDAR AND OTHERS

v.

KING-EMPEROR.\*

CRIMINAL.

1921.

September, 21.

*Murder—Penal Code (Act XLV of 1860), section 299 expl. notion—Person suffering from injury—Not fatal to ordinary men.*

If a person was suffering from an injury which would render injuries (which would not have a fatal effect to one ordinary man) fatal to that person, it does not necessarily follow, as it would in the case of a healthy man that the person inflicting those injuries knew it to be likely that death would be caused thereby.

Appeal by six accused under section 410 of the Code of Criminal Procedure.

The accused were sentenced to transportation for life and to rigorous imprisonment for offences under sections 302 read with sections 149, 148, 302 read with 34 and 324, Indian Penal Code.

The material facts appear from the judgment.

*Babus Dasarathi Sanyal, Manmatha Nath Mukerjee and Aswini Kumar Gupta* for the Appellants.

*Mr. Orr* for the Crown.

The judgment of the Court was as follows :

The appellants in these cases were tried before the 2nd Additional Sessions Judge of Buckergunge and a jury and the jury unanimously found them guilty on all the charges found against them. All the accused were charged with rioting armed with deadly weapons and also with being guilty of murder in consequence of one Nehaluddi having been murdered in prosecution of the common object of the unlawful assembly. Four of the accused were also convicted of murder after bringing into operation the provisions of section 34, Indian Penal Code. All the accused have been sentenced to transportation for life and further sentences have been passed of three years rigorous imprisonment each under section 148, Indian Penal Code, the sentences to run concurrently. The appellant Kabiruddin has further been convicted of an individual act of causing hurt with a dangerous weapon and sentenced to three years' rigorous imprisonment under section 324—this sentence also to run concurrently with the sentence of transportation for life.

September, 21.

\* Criminal Appeals Nos. 358 and 363 of 1921, against the orders of Rajendra Lal Sadhoo, Esq., Second Additional Sessions Judge of Bakarganj, dated the 4th May, 1921.

CRIMINAL.

1921.

Ainuddi

v.

King-Emperor.

An objection has been taken to the framing of the charges of murder ; but we see no reason why in the present case the persons alleged to have taken a more immediate part in the causing of the death of the deceased should not be charged under section 302 read with section 34, Indian Penal Code and also charged with others with constructive murder under the provisions of section 149 nor can we accept the contention that, on the facts alleged and found, section 34 is not applicable to the case of the appellants who have been convicted under section 302 read with that section. But we are of the opinion that there has been a serious misdirection in putting the medical evidence before the jury. According to the medical evidence Nehaluddi, the person found to have been murdered had four injuries on his person, three wounds in his head scalp deep and a deep cut wound on his side. It was also found that the membranes of the brain were deeply congested and covered with a thick layer of coagulated lymph. In the opinion of the Civil Surgeon who held the post mortem examination, death was due to shock and hemorrhage resulting from the injuries just mentioned and probably accelerated by the condition noted in the membrane of the brain which appeared to be of old standing. In putting the medical evidence to the jury, the learned Sessions Judge correctly put to them explanation of section 299 Indian Penal Code which provides that a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity and thereby accelerates the death of that other shall be deemed to have caused his death. But what he omitted to do was to point out that, if a person was suffering from an injury which would render injuries which would not have a fatal effect to one ordinary man, fatal to that person, it does not necessarily follow, as it would in the case of a healthy man, that the person inflicting those injuries knew it to be likely that death would be caused thereby. The fact that the deceased was suffering from a disease which accelerated his death and also the fact that the injuries described in the medical evidence are in themselves not apparently sufficient to cause immediate death should have been pointed out to the jury and they should have been asked whether they were satisfied that the accused when attacking Nehaluddi knew or had reason to believe that the injuries they caused to him were likely to cause death and whether it could be inferred that they intended to cause death. It may be that the view of the jury was that when a number of persons armed with spears did attack a person, they intended to cause his death and that the fact that he died a little sooner owing to unknown

infirmities did not affect the case. But it may also be that, had the bearing of the medical evidence on the intention of the accused been properly put to the jury, they would not have been able to come to the decision they did that by causing the death of Nehaluddi the offence of murder was committed. Taking this view, we must hold that there has been a misdirection and that that misdirection has in effect caused a miscarriage of justice. But having regard to the fact that the accused have also been convicted and sentenced for the offence of rioting armed with deadly weapons which conviction is, in no way, affected by this misdirection, we do not think it necessary to order a retrial. We also think that, having regard to the youth of the appellant Hayyat Ali who is recorded to be 14 years of age, the sentence on him may be considerably reduced. We accordingly allow these appeals to this extent: the conviction of the appellants under section 302 read with section 149 Indian Penal Code are set aside and also the conviction of the four appellants, Ainuddi Chowkidar, Barukhan, Shujaddi and Khadun Ali under section 302 read with section 34 Indian Penal Code are set aside and also the sentence of transportation for life passed under those sections. We affirm the convictions of the appellants under section 148 Indian Penal Code and also the conviction of Khabi-ruddin under section 324 Indian Penal Code and uphold the sentences passed on them under these sections, except in the case of the accused Hayyat Ali. We reduce the sentence passed on this accused Hayyat Ali to one year's rigorous imprisonment.

A. T. M.

*Sentences modified in some cases.*

CRIMINAL.

1921.

Ainuddi

v.

King-Emperor.

## APPELLATE CIVIL

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.  
Justice Panton.

TUSTEE MONDAL AND OTHERS

*v.*  
KENARAM MONDAL AND OTHERS.\*

*Easement—Transfer of one part of tenement—Condition of land transferred, how determined—Accommodation—Severance—Easement of necessity—Presumption.*

Where the owner of two tenements or of one tenement divided into two parts, transfers one part he puts an end by contract to the relation which he had himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation; the condition of such land is thenceforth determined by the contract of alienation and not by the previous user of the former common owner during his common ownership: *Saffeld v. Brown* (1) and *Crossley v. Lightowler* (2).

Where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will, upon severance, ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained and the accommodation be such that it is capable of constituting the subject matter of an easement.

Where an owner grants part of his land and retains other part himself, although the grantee may be in a more favourable position than the grantor so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all 'easements of necessity' without which no enjoyment at all would be possible should be raised by implication in favour of the part retained: *Richards v. Rose* (3) and other cases.

Appeal by Defendants Nos. 2 to 4.

Suit for recovery of certain plots of land from which the plaintiff was dispossessed by the defendants and also for a declaration that the defendants had no right of way over certain other plots of land.

The Court of first instance dismissed the suit. The lower appellate Court decreed the suit. On second appeal it was held that the right of way claimed by the defendants was negatived, by the following judgment of

\* Letters Patent Appeal No. 67 of 1920, against the decision of Mr. Justice Shamsul Huda, dated the 20th July, 1920, in Appeal from Appellate Decree No. 1867 of 1919, against the decree of Babu Bepin Chandra Chatterjee, Subordinate Judge of Jessore, dated the 31st July, 1917, reversing that of Babu Basanta Behari Mukherjee, Munsiff, Additional Court, Narail, dated the 29th June, 1918.

(1) (1863) 4 DeG. J. and S. 185.

(2) (1867) L. R. 2 Ch. App. 478.

(3) (1853) 9 Ex. 218 (221).

**Shamsul Huda, J.**—This is an appeal by the defendants and arises out of a suit instituted by the plaintiff for recovery of certain plots of land from which he alleges to have been dispossessed by the defendants and also for a declaration that the defendants have no right of way over certain other plots. The suit was dismissed by the first Court and was decreed in full by the lower appellate Court. The decree so far as it relates to the plots out of which the plaintiff is said to have been dispossessed, and of which possession had been awarded to the plaintiff, is not challenged in this appeal. The only part of the decree which is attacked on appeal is that which relates to the right of way. It appears that there was a plot of land of which the defendants were the original tenants. The land was sold in execution of a decree against them and purchased by the landlord. Subsequently in the year 1308 B. S. the plaintiff took settlement of the western plot and in the year 1313 the defendants took settlement of the eastern plot. It is clear that the defendants cannot rely on any rights they had before the execution sale which extinguished their title and they could not claim a right of way against the plaintiff under section 26 of the Limitation Act, because they obtained the settlement within a period of less than 20 years from the date of the institution of the suit. It is argued however, that the defendants had an easement of necessity. I cannot understand how the defendants can claim an easement of necessity against the plaintiff. It is found that after the settlement with the plaintiff no ~~has~~ land of the landlord remained and that the settlement included the whole land to the west. That being so, the settlement with the plaintiff being earlier, the landlord could not, in settling the eastern plot with the defendants, grant to them expressly or by implication a passage over land which he had already settled with the plaintiff. Upon this view of the case no easement of necessity can be claimed by the defendants. It is immaterial to enquire under the circumstances whether the defendants have any other passage to go out of their land. If they took settlement of a plot of land which had no passage, and if the landlord had no right to give them a passage over land which he had already settled with the plaintiff that cannot entitle them to claim an easement of necessity over the land belonging to the plaintiff. The principle on which an easement of necessity is founded is that the law presumed that when a person transfers a part of his property to another, it is the intention of the parties that the transferee should have the means of using the thing transferred and therefore that he should have all the rights and powers in or over the transferor's

CIVIL.

1921.

Tustee Mondal

v.

Kenaram.

1920.

July, 20.

CIVIL.

1921.

Trustee Mondal

v.

Kenaram.

August, 2.

other property which might be requisite for his purpose. The appeal must be dismissed with costs.

Against this decision the defendants Nos. 2 to 4 appealed under clause 15 of the Letters Patent.

*Babu Gopendra Nath Das* for the Appellants.

*No one* appeared for the Respondents.

The judgment of the Court was delivered by

**Mookerjee J** :—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Huda in a suit instituted by the plaintiff respondent for recovery of certain plots of land from which he alleges he has been dispossessed by the defendants and also for a declaration that the defendants have no right of way over certain other plots of land. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge decreed the suit. On appeal to this Court the decree of the Subordinate Judge in so far as it establishes the title of the plaintiff to the plots claimed by him was not controverted. But it was argued that the Subordinate Judge had erroneously negatived the right of way claimed by the defendants. Mr. Justice Huda held that the contention of the defendants in respect of the alleged right of way was not tenable and confirmed the decree of the Subordinate Judge. On the present appeal the judgment of Mr. Justice Huda has been assailed on the ground that the principle applicable to cases of reservation of easements has not been correctly applied to the facts of this litigation.

It appears that there was a plot of land which was originally held by the defendants as tenants. The land was sold in execution of a decree against them and was purchased by the landlord. In the year 1901 the plaintiff took settlement of the western plot which abutted on a road and in the year 1906 the defendants took settlement of the eastern plot. It is with regard to this eastern plot that the defendants now contend that they are entitled to have access to the road across the western plot settled with the plaintiff. Mr. Justice Huda has held that the defendants cannot rely on any rights their grantors might have possessed before the execution sale which extinguished their title, nor can they claim a right of way against the plaintiff under section 26 of the Indian Limitation Act because they obtained the settlement within a period of less than 20 years from the date of the institution of the suit. This view is unquestionably right; the decisions in *Suffield v. Brown* (1), and *Crossley v. Lightowler* (2), show that where the owner of two tenements or

(1) (1863) 4 DeG. J. and S. 183.

(2) (1867) L. R. 2 Ch. App. 478.



of one tenement divided into two parts transfers one part, he puts an end by contract to the relation which he had himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation; the condition of such land is thenceforth determined by the contract of alienation and not by the previous user of the former common owner during his common ownership. The question thus inevitably arises, whether the defendants have an easement of necessity, because, where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will upon severance ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained and the accommodation be such that it is capable of constituting the subject matter of an easement. According to Mr. Justice Huda, inasmuch as it has been found that after the settlement with the plaintiff, no khas land of the landlord remained and that the settlement included the whole land to the west, the landlord could not, when he afterwards settled the eastern plot with the defendants, grant to them expressly or by implication a passage over the land which he had already settled with the plaintiff. This view is assailed by the appellant, and the crucial question is, whether when the landlord settled the western plot with the plaintiff in 1901, there was an implied reservation of an easement of necessity in respect of the eastern plot retained by him. We are of opinion that this question should be answered in the affirmative provided that it is established that at the time of the grant there was a way of necessity in respect of the eastern plot which was retained by the landlord.

The principle applicable to cases of this character was lucidly explained by Theisiger L. J. in the case of *Wheeldon v. Burrows* (1) in the following terms: We have had a considerable number of cases cited to us and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean quasi easements), or in other words, all those easements which are necessary to the reasonable enjoyment of the property granted. The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the

(1) (1879) 12 Ch D 31.

CIVIL.

1921.

Tustee Mondal  
v.

Kenaram.

Mookerjee, J.

• CIVIL.

1921.

Trustee Mondal

v.

Kenaram.

Mookarjee, J.

second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is well established by authority as it is consonant to reason and common sense viz, that a grantor shall not derogate from his grant." The distinction thus pointed out between easements which may be claimed by the grantee and easements which are reserved by the grantor has not always been recognized. In *Pyer v. Carter* (1), implied grants and implied reservations of apparent easements were put on the same footing, but this was disapproved of in *Suffield v. Brown* (2) and *Wheeldon v. Barrows* (3), and it was held that if a grantor of part of his estate wishes to reserve an easement over it for himself, he should do so in express terms; as such reservation cannot be implied, being in derogation of his grant. The same view was maintained in the case of *Taws v. Knowles* (4) in which the owner of a house and garden built a second house in the garden and walled off a strip of the garden by the second house to serve as a special way from the old house to a back street and used it continually; yet, because on separation of the two houses, when the strip with the path went with the new house, no express reservation was made of the right of way from the old house, the right was disallowed. In *Thomas v. Owen* (5) however a reservation of a right of way was allowed to be implied without any words of reservation in the grant, as the condition and direction of the road as well as the long user of it for the sole benefit of the part of the estate reserved was considered proof positive that the grantor of the servient tenement must have intended to reserve the right of way. Thus the old rule that upon severance of an estate and in the absence of any express grant, those quasi-easements which the owner of the entirety has been accustomed to use for the beneficial enjoyment of the part sold over the part retained, if of an apparent and continuous character, will be given to the grantor by implied grant, but that similar easements will not be reserved for the benefit of the part retained by implied reservation, must be deemed to have been shaken, if not "almost swept away." But,

(1) (1857) 1 H. & N. 916.

(2) (1863) 4 De G. J. & S. 185.

(3) (1879) 12 Ch. D. 31.

(4) (1891) 2 Q. B. 564.

(5) (1887) 20 Q. B. D. 225.

whatever divergence of opinion there may be upon the general doctrine of the creation of easements by implication of law and the applicability of the principles that a man shall not derogate from his grant and a grant shall always be construed most strictly against the grantor, there is weighty authority for the view that where an owner grants part of his land and retains other part himself, although the grantee may be in a more favourable position than the grantor in so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all "easements of necessity" without which no enjoyment at all would be possible should be raised by implication in favour of the part retained: *Richard v. Rose* (1); *Union Lighterage Co. v. London G. D. C.* (2); *Ray v. Haseldine* (3); *Gordon v. Ogilvie* (4); *Schwinn v. Cotton* (5); *Derry v. Sanders* (6). This is also the result of the provisions of the Indian Easements Act. Section 13, clause (4) provides that where one person transfers immovable property to another, if an easement in other immovable property of the transferor is necessary for enjoying the subject of the transfer, the transferee shall be entitled to such easement. Illustration (C) is to the following effect: "A the owner of two fields, sells one to B and retains the other. The field retained was at the date of the sale used for agricultural purposes only, and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained." The Indian Easements Act no doubt is not applicable to the case before us; but, as was pointed out by Mr. Justice Banerjee in *Kadambini Debi v. Kali Kumar Haldar* (7), since there is no enactment of the legislature applicable to a case like this, the question raised will have to be answered with reference to the principles of justice, equity and good conscience; and the Courts in this country have considered the rule of English law known as the doctrine of implied grant of easements upon severance of tenements, as in accordance with justice, equity and good conscience. The conclusion follows that the view taken by Mr. Justice Huda cannot be supported.

The appeal must consequently be allowed, the judgment and decree of Mr. Justice Huda set aside and the case remitted to the Subordinate Judge for consideration of the question raised in the eighth issue which was framed in the following terms: whether the

(1) (1853) 9 Ex. 218 (221). (2) (1902) 2 Ch. 557 (573).

(3) (1904) 2 Ch. 17 (20). (4) (1899) 15 T. L. R. 239.

(5) (1916) 2 Ch. 459. (6) (1919) 1 K. B. 223.

(7) (1899) 1 L. R. 26 Cal. 516.

CIVIL.

1921.

Tustee Mondal.

v.

Kenaram.

Mookerjee, J.

CIVIL.

1921.

Tustee Mondal

v.

Kenaram.

Mookerjee, J.

defendants have a right of way as claimed by them over the land as shown in the sketch annexed to the written statement. The Subordinate Judge will first consider whether the defendants have an easement of necessity. If the question is answered in the affirmative the Subordinate Judge will next consider the location of the way. As the decree of the Subordinate Judge upon the question of title has not been assailed and must stand confirmed, there will be no order as to the costs of this appeal.

A. T. M.

*Appeal allowed: Case remanded.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

MOHAN MOLLA

v.

BARU BIBI AND ANOTHER.\*

CIVIL.

1921.

July, 25.  
August, 23.*Divorce—Iddat, period of—Talak-i-bain—Talak-ahsan—Talak-hasan.*

A divorce in the case of talak-i-bain or irrevocable talak takes effect from the date of the writing and not from the date of its receipt by the wife, unless there are words in the instrument which show a different intention.

The option to revoke in the case of talak-ahsan continues till the expiration of the period of iddat, and in the case of talak-hasan, till the third pronouncement.

Appeal by the Plaintiff.

Suit for restitution of conjugal rights.

The first defendant Baru Bibi was married to A. On the 12th May, 1916, A executed and registered a deed of divorce in her favour. On the 20th May, 1916, A saw the lady, pronounced the legal formulas, made over the document to her and went away. On the 12th August, 1916, she went through a ceremony of marriage with the third defendant. On the 3rd September, 1916, she went through another ceremony of marriage with the plaintiff. The Court of first instance dismissed the suit. The lower appellate Court decreed the claim. This decree was in turn in second appeal reversed by the following judgment of

\* Latters Patent Appeal No. 44 of 1920, against the decision of Mr. Justice Newbould, dated the 3rd May, 1920, in Appeal from Appellate Decree No. 1629 of 1919, against the decree of Babu Moti Lal Roy, Officiating Additional Subordinate Judge of Faridpur, dated the 17th July, 1919, reversing that of Babu Satchidanando Mukherjee, Additional Munsiff of Madaripur, dated the 15th June, 1918.

**Newbould, J.**—This appeal arises out of a suit for restitution of conjugal rights. The first defendant Baru Bibi was divorced by her first husband by a *talaknama* dated 12th May 1916. Eight days afterwards that husband saw the wife pronounced the legal formula and made the document over to her. On 12th August 1916 the defendant No. 1 went through a form of marriage with defendant No. 3, and on 3rd September 1916 she went through a form of marriage with the plaintiff. The lower appellate Court has decreed the plaintiff's suit on the finding that the marriage to defendant No. 3 was invalid because it took place during the period of *iddat*. In coming to this finding it appears to have wrongly held that the period of *iddat* commenced on 20th May when the word *talak* was pronounced within the hearing of the wife. From the authorities it would appear that the period of *iddat*, when there has been a divorce by a deed, commences from the date of the document. In the case of *Sarabai v. Rabiabai* (1), it has been held that "a divorce by *talaknama* is effected as soon as the words are written even without the wife receiving the writing." Also, at page 164 of Wilson's Anglo-Mahamadan Law, 2nd edition, I find "For the purpose of estimating the duration of the *iddat*, a divorce by writing is considered to take effect from the date of the writing, not from the date of receipt, in default of words showing a different intention." There it is not suggested that the *talaknama* contained any words which would suggest that it would not take immediate effect. Further authority in support of this view will be found in Tyabji's Mahammedian Law 2nd edition page 219. For the respondent reliance is placed on the case of *Furrudd Hossein v. Jaun Bibee* (2) but that case has no bearing on the point that arises in this case as the divorce which was the subject of that case was not alleged to have been effected by a deed. If the divorce of defendant No. 1 by her first husband took place from 12th May 1916, there can be no ground for holding that the marriage to defendant No. 3 was void. Even if the period of the *iddat* be held to have commenced from 20th May it is quite possible that it might have expired before this marriage. The defendant's contention is that she was pregnant at the time of her divorce and miscarried. That would determine the period of the *iddat*. Further in the case of a girl of this age, the period of *iddat* is not three calendar months but three courses in the case of a woman subject to menstruation. Even if I held that the lower appellate Court was right in law in dating the commencement of the *iddat* from 20th May, it would be necessary to remand the case

CIVIL.  
1921.  
Moham  
v.  
Baru Bibi.  
1920.  
May, 3.

(1) (1905) 1 L. R. 30 Bom. 537.

(2) (1878) 1 L. R. 4 Calc. 588.

CIVIL.

1921.

Mohan

v.

Baru Bibi.

Newbould, J.

for a definite finding as to the truth or otherwise of the allegation of pregnancy and miscarriage. It appears that the defendant No. 1 is still living with the defendant No. 3. The marriage of the plaintiff took place during the validity of her marriage with defendant No. 3 and consequently was not a legal marriage. I must, therefore, hold that the plaintiff's case fails and was rightly dismissed by the Court of first instance. I accordingly decree this appeal, set aside the judgment and decree of the lower appellate court and restore those of the Court of first instance. The appellant will get his costs in this and in the lower appellate Court.

Against this decision, the plaintiff appealed under clause 15 of the Letters Patent.

*Babus Trailokya Nath Ghose* and *Manmatha Nath Ray* for the Appellant.

*Babu Rupendra Kumar Mitra* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

August, 23.

**Wokerjee J:**—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr Justice Newbould in an appeal from appellate decree in a suit for restitution of conjugal rights.

The first defendant Baru Bibi was married to one Erfan. On the 12th May, 1916, Erfan executed and registered a deed of divorce in her favour. On the 20th May, 1916, Erfan saw the lady, pronounced legal formulas, made over the document to her and went away. On the 12th August, 1916, she went through a ceremony of marriage with the third defendant. On the 3rd September, 1916, she went through another ceremony of marriage with the plaintiff. The plaintiff and the third defendant are, consequently, the rival claimants. The case for the plaintiff is that no valid marriage took place between her and the third defendant on the 12th August, 1916, inasmuch as the period of iddat had not expired at that time. If this view is maintained, there is no bar to the validity of the marriage between her and the plaintiff. The determination of the controversy between the parties thus depends on the solution of the question, when did the period of iddat expire, in other words, when did the period of iddat commence—on the 12th May, 1916, as the third defendant urges or on the 20th May, 1916, as the plaintiff contends? The Court of first instance decided against the plaintiff and dismissed the suit. The Subordinate Judge decided in favour of the plaintiff and decreed the claim. Mr Justice Newbould has reversed this decision and restored the decree of dismissal made by the trial Court. On

the present appeal, we have been invited to decide whether the divorce became operative from the 12th May, 1916 or from the 20th May, 1916.

It is stated in the Digest of Anglo-Muhammadan Law by Sir Roland Wilson (5th Ed. 1921 Art. 62) that a talak divorce may be effected by writing as well as by word of mouth (Baillie Book III. Chap. ii, Sec. 6, pp. 232-235). Such writing must ordinarily be addressed to and reach the wife. Two exceptions are then specified. We are concerned here only with the first exception, namely, that for the purpose of estimating the duration of the iddat, a divorce by writing is considered to take effect from the date of the writing, not from the date of receipt, in default of words showing a different intention. The rule thus enunciated is supported by the judgment of Batchelor J. in *Sarabai v. Rabiabai* (1), where it is stated that the authorities show that a bain talak, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing; Baillie p. 233; Mahomed Yusoof, Tagore Law Lectures, Vol. III p. 95. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing." It is to be noted that in the case mentioned, the talak was talak-i-bain or irrevocable talak, and belonged to the category of talak-ul-bidaat, the only kind of talak which becomes irrevocable immediately it is pronounced. The other two kinds of talak, namely, talak-ahsan and talak-hasan are always revocable, and the option to revoke continues, in the former case till the expiration of the period of iddat, and in the latter case till the third pronouncement.

The effect of a talak by writing as stated in *Sarabai v. Rabiabai* (1) is accepted by Tayabji in his treatise on Principles of Muhammadan Law, Art. 145. This view is not contradictory to the decision in *Furzund v. Janu* (2) where the divorce was not by writing, and it was ruled that the mere pronouncement of the word talak three times by the husband, without its being addressed to any person, is not sufficient to constitute a valid divorce. We observe, however, that the decision in *Furzund v. Janu* (2), has been doubted in the cases of *Ful Chand v. Nazab Ali* (3), and *Asha Bibi v. Kadir* (4), where it was ruled that according to the Hanafi Law, it is not essential that the talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce, and that,

(1) (1905) I. L. R. 30 Rom. 537.

(2) (1878) I. L. R. 4 Calc. 588.

(3) (1908) I. L. R. 36 Calc. 184; 9 C. L. J. 105.

(4) (1909) I. L. R. 33 Mad. 22.

CIVIL.

1921.

Mohan

Baru Bibl.

Mookerjee, J.

CIVIL.  
1921.  
Mohan  
v.  
Baru Bibi:  
Mookerjee, J.

consequently, the absence of the wife does not make the pronouncement of talak void and inefficacious. A similar view appears to have been adopted in *Wahid Khan v. Zainab Bibi* (1).

The position then is that the divorce in this case took effect from the date of the writing and not from the date of its receipt by the wife, unless there are words in the instrument which show a different intention. As the document has not been produced, it is impossible for us to decide finally its legal effect on the status of the parties and the matter must accordingly be re-investigated. The respondent has further contended that she was pregnant at the time of her divorce and miscarried; if this fact be established, the period of iddat would be terminated. It has also been urged that in the case of a girl of this age, subject to menstruation, the period of iddat was not three calendar months but three courses. This also has not been considered (Hedaya, Book IV, Chap. XII, P. 128). Finally, it has been argued on behalf of the respondent that, as appears from the register of talaknamas, the divorce was in Khula form; if the divorce was really in that form, the fact cannot be ignored and may vitally affect the situation of the parties.

We hold, accordingly, that the appeal must be allowed, the decree made by Mr. Justice Newbould set aside, and the case remitted to the Court of first instance for retrial of the question of validity of the marriage between the first and third defendants. The Court will take steps to compel the production of the talaknama and allow the parties to adduce relevant evidence regarding the divorce of the first defendant by her first husband. The costs of the two hearings in this Court and of the hearing before the Subordinate Judge will abide the result.

A. T. M.

*Appeal allowed : Case remanded.*

(1) (1914) I. L. R. 36 All. 458.



*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Buckland.*

SATIS CHANDRA GHOSH

v.

KALIDASI DASL.\*

CIVIL.

1921.

April, 4, 5, 6, 7,  
8, 11, 12.  
July, 15.

*Pardanashin lady—Deed, execution of—Independent legal advice—Person standing in a fiduciary character—Absolute stranger—Burden of proof—Evidence adduced on both sides—Family settlement, when operative—Pleading—Fraud—variance between pleading and proof.—Guardian of Hindu widow.*

The Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. These principles will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically: *Mariam v. Ibrahim* (1). The fairness of the bargain is the crucial test.

Independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction: *In Re Coomber* (2).

It is not an inflexible rule that a *pardanashin* lady must have independent legal advice.

The Court should have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself: *Sunitibala v. Dhara Sundari* (3), and other cases.

There is a grave risk of failure of justice, if these general principles are moulded into inelastic formulas or crystallised into inflexible rules, and treated as

\*Appeal from Original Decree No. 195 of 1919, against the decree of Babu Syama Charan Ukil Banerjee, Subordinate Judge of Howrah, dated the 15th July, 1919.

(1) (1916) 28 C. L. J. 306 (367).

(2) (1911) 1 Ch. 723 (730).

(3) (1919) L. R. 46 I. A. 272; I. L. R. 47 Cal. 175.

CIVIL.

1921.

Satis

v.

Kalidasi.

of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Where there is a question of good faith of a transaction between the parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage,

If a confidence is reposed and that confidence is abused, Courts of equity will grant relief. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original rights, for equity demands in such circumstances the most abundant good faith in the transaction between the parties: *Baker v. Bradley* (1), and other cases.

To secure a fair transaction, a full appreciation by the lady of the value and nature of her rights is essential.

The question is one of substance and not merely one of burden of proof, and where evidence has been adduced by both the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay: *Kundal Lal v. Begam* (2) and another case.

It is not necessary to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the compromise should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed: *Sunitibala v. Dhara Sundari* (3).

The absence of advice would not have by itself necessarily vitiated the transaction, if it had been otherwise established to be righteous, that is, such as a right-minded person might be expected to do: *Keshub v. Radha Raman* (4).

To make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection; one side must not know more about the matter than the other, unless what he knows could not possibly have affected the other party's decision; *Moxon v. Payne* (4).

(1) (1856) 25 L. J. Ch. 7; 7 DeG. M & G. 597.

(2) (1918) 23 C. W. N. 937.

(3) (1919) L. R. 46 I. A. 272; 1 L. R. 47 Calc 175.

(4) (1912) 17 C. W. N. 991.

(5) (1873) L. R. 8 Ch. App. 881; 43 L. J. Ch. 340.

A family arrangement to be operative must be without fraud; it will not be supported if founded on mistake of either party to which the opposite party was an accessory; or if either party has been misled by the concealment of material things; for the essence of the matter is mutual communication of all relevant circumstances: *Gordon v. Gordon* (1).

The Court should not scan with nicety the quantum of consideration in a deed of family settlement: *Upendra v. Bindeshri* (2) and *Mariam v. Ibrahim* (3).

When a Hindu husband is deceased, his kin is the guardian of his childless widow; it is only when the husband's family becomes extinct or contains no male or is helpless, that the heirs of her own father are entitled to be her guardians.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

A charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it: *Abdul Hossain v. Turner* (4), and *Bal Gangadhar v. Shrinivas* (5).

Every variance between pleading and proof is not fatal; the Court must carefully consider whether the objection is one of form or of substance. The rule that the allegations and the proof must correspond, is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations.

A Court can order amendment of a plaint to do that substantial justice between the parties for which alone it exists: *Mohummud Zakoar v. Rutta Koer* (6).

When a case is based on fraud, the fraud must be proved, and no relief can be given in the suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit: *Moxon v. Payne* (7).

Per Buckland, J.: In a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and even should the Court find that fraud was practised, if such fraud is other than the fraud alleged, the defendant is entitled to have the suit dismissed. This is a proposition which may be

(1) (1816—21) 3 Swan. 400; 19 R. R. 230.

(2) (1915) 22 C. L. J. 452.

(3) (1916) 28 C. L. J. 306 (369).

(4) (1887) L. R. 14 I. A. 111; 1 I. L. R. 11 Bom. 620.

(5) (1915) L. R. 42 I. A. 135 (151) I. L. R. 39 Bom. 441 (467); 22 C. L. J. 1 (19).

(6) (1867) 11 M. I. A. 468 (481); 9 W. R. P. C. 9.

(7) (1873) L. R. 8 Ch. App. 881 (887).

CIVIL.

1921.

Sais

v.

Kalidasi.

## • CIVIL.

1921.

Satis

Kalidasi.

applicable in cases between man and man or where a *pardanashin* lady is not concerned. But where a *pardanashin* lady is involved, other and equally well-known rules have to be applied and conformity with them has to be established.

A *pardanashin* lady must have advice, that the advisor should have no adverse interest, and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary, contrasting them with her rights; if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential.

## Appeal by the Defendant.

Suit for cancellation of a partition deed, for declaration of exclusive title to a hardware business, its assets and the properties acquired from its income, for declaration of joint title to other properties, for partition and accounts, and for incidental reliefs.

The material facts appear from the judgment.

• *Mr. T. C. P. Gibbons (Advocate-General), Babu Jogenendra Nath Mookerjee, Dr. Sarat Chandra Basak and Babu Pares Nath Mookerjee* for the Appellant.

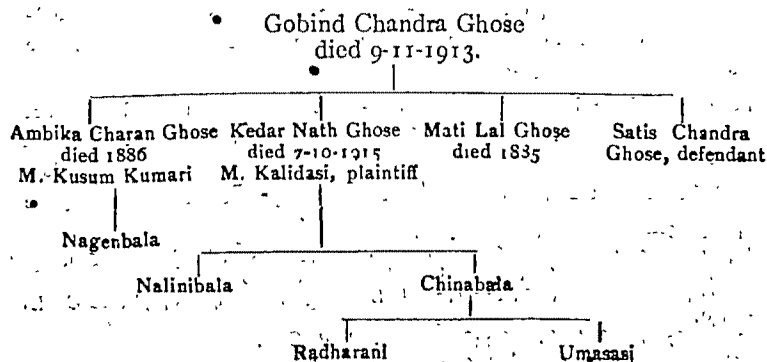
*Dr. Dwarka Nath Mitter, Babus Manindra Nath Banerjee, Narendra Krishna Bosu and Ramu Prosad Mookerjee* for the Respondent.

C. A. V.

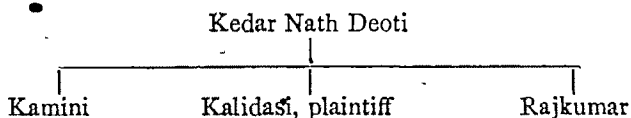
The judgments of the Court were as follows :

July, 15.

**Mookerjee J.**—The subject matter of the litigation which has culminated in the present appeal is an estate of considerable value left by one Kedar Nath Ghose who died intestate on the 7th October, 1915. The foundation of the fortune of the family was laid by his father Govinda Chandra Ghosh who executed a will on the 21st August 1905 which was registered but was not probated after his death on the 9th November, 1913. The relationship of the members of the joint family composed of the descendants of Govinda Chandra Ghose will appear from the following genealogical table :



Govinda Chandra Ghosh had four sons, Ambika Charan and Moti Lal who died in his lifetime, and Kedar Nath and Satish Chandra who survived him. When Kedar Nath died, he left him surviving his brother, Satis Chandra, his widow Kalidasi, his widowed daughters Nalinibala and Chinabala, and two grand-daughters, Radharani and Umasasi. The widow Kalidasi had two brothers Kamini and Rajkumar, and was the daughter of a family of Deotis whose genealogical table is set out below :



Shortly after the death of Kedar Nath Ghose, a partition deed was executed on the 4th November 1915 between his brother Satis Chandra and his widow Kalidasi, and the document was registered on the 8th December 1915. On the 28th June, 1916, the widow instituted the present suit for cancellation of the partition deed on the ground of fraud and unfairness, for declaration of exclusive title to a hardware business, its assets and the properties acquired from its income, for declaration of joint title to other properties, for partition and accounts, and for incidental reliefs. The defendant denied all the material allegations in the plaint, repelled the imputation that the partition deed had not been fairly obtained, asserted that the properties claimed as exclusively owned by the husband of the plaintiff really formed part of the joint family estate, and repudiated all liability to render accounts. On these pleadings, the following issues were framed and set down for trial :

1. Has the plaintiff any cause of action?
2. Can the suit proceed without ad valorem court-fees being paid on the value of the entire properties in suit?
3. Is the suit bad for non-joinder of parties?
4. Was the deed dated the 4th November, 1915, read over and explained to the plaintiff and was it understood by her? Was it executed by her with free will and consent? Or was it obtained from her by fraud as alleged in the plaint?
5. Was Kedar Nath Ghose the sole owner of the Karbar at 78 Clive Street, Calcutta? Or, did it belong to his father Govind Chandra Ghose, and was inherited, on his death by his two sons Kedar and Satis? Was it their joint property?
6. Was the house at Benares the joint property of Kedar and Satis? What is the plaintiff's share in it?

CIVIL.

1921.

Satis

v.

Kalidasi.

Mookerjee, J.

CIVIL.

1921.

Satis

Kalidasi.

Mookerjee, J.

7. Did the plaintiff's husband purchase the garden at North Bantra from the widow of Bellilios in benami of the defendant?

8. Is the suit barred by the principles of estoppel, acquiescence and waiver?

9. Was the manufactory at Bantra an independent karbar? Or, did it form one karbar with the karbar at 78, Clive Street?

10. Is the defendant liable to render accounts of the karbar at Bantra and of the karbar at 78 Clive Street? If so, for what period.

After a protracted trial, the Subordinate Judge decreed the suit in part. He held on the fourth and eighth issues that the deed had been executed by the plaintiff under circumstances which made it inoperative against her as an illiterate pardanashin lady, and that there was no question of estoppel, acquiescence or waiver. He also held, upon the fifth, sixth, seventh and ninth issues, that the hardware business at 78, Clive Street which stood in the name of Kedar Nath Ghosh was an ancestral joint family concern, that the smithy and manufactory in the family dwelling house at South Bantra in the District of Howrah was not an independent business, that the lands and houses in Calcutta and Benares had been acquired with joint funds and formed part of the family estate, and that the garden at North Bantra purchased from Bellilios must be included in the same category. He further held, on the tenth issue, that the defendant who was in charge of the business at 78, Clive Street and at South Bantra was bound to render accounts from the date of the death of Kedar Nath Ghose. On these findings, the Subordinate Judge has set aside the partition deed, declared that all the properties in suit were jointly owned and possessed in equal shares by Kedar Nath Ghosh and Satis Chandra Ghosh, and directed partition and accounts; he has also ordered the parties to bear their respective costs. Neither the plaintiff nor the defendant is satisfied with this decision, as the latter has appealed and the former has preferred a memorandum of cross-objections. The substantial question argued on the appeal relates to the validity of the partition deed; the principal point raised in the memorandum of cross-objections refers to the true character of the properties claimed by the plaintiff as the separate acquisitions of her husband. Neither the memorandum of appeal nor the memorandum of cross-objections bore adequate court-fees, and the Court was called upon to decide the point during the course of the arguments. Each memorandum bore a court-fee of Rs. 10 only; this was plainly inadequate. The defendant appellant had obviously anticipated the objection and had

made a note on his memorandum at the time of presentation to the following effect "The suit was valued at Rs. 1,21,360. The appeal is for a declaration" This note must have been recorded in view of clause 17(iii) of schedule II of the Court-Fees Act, 1870, which provides that the plaint or memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed must bear a court-fee of Rs. 10. But the plaint in the present case was unquestionably not a plaint in a suit of this description and bore a court-fee of Rs. 1,187-8. The memorandum of appeal also could not be treated as a memorandum in a suit of that nature; indeed, the appeal itself was not in essence for a pure declaration. The trial Court had cancelled the partition deed, had determined the question of title to the properties, had directed partition of all the properties in suit, and had rendered the defendant liable for accounts. An appeal directed against a decree so comprehensive in scope, can, by no stretch of language or recourse to legal fiction, be described as an appeal for a declaration, even if we were to assume that an appeal, which really seeks nothing beyond a declaration, in a suit other than a suit for a pure declaratory decree without consequential relief, was ever intended to be included within clause 17(iii) of schedule II of the Court-Fees Act, 1870. Similar remarks were applicable to the memorandum of cross-objections. The appellant and respondent were consequently called upon to value the reliefs sought in the appeal and by way of cross-objections, respectively. It is not necessary to set out the details of the calculations made for the purpose of valuation; suffice to state that, as a result of this investigation, it was found that the appellant and respondent were liable to pay Rs. 1,105 and Rs. 825 respectively, as deficit court-fees on the memorandum of appeal and the memorandum of cross-objections. It was also found that the fee paid *ad valorem* on the plaint in the Court below was insufficient and that an additional sum of Rs. 145 was leviable on that account from the plaintiff respondent. The appellant duly paid the deficit court-fee and thus regularised the memorandum of appeal. The plaintiff respondent paid the additional sum leviable on the plaint, but not the deficit court-fees required to validate the memorandum of cross-objections. There is consequently, no valid cross-objection which may be considered by the Court, and the memorandum must be rejected. The arguments on both sides have thus centered round what is the root question in this case, namely, the validity of the partition deed taken by the appellant from the respondent. Before, however, we investigate the circumstances which led up to the execution of the deed, we

CIVIL

1921.

Satis

v.

Kalidasi

Mookerjee, J.

Civil.  
 1921.  
 Satis  
 v.  
 Kalidasi.  
 Mookerjee, J.

may usefully recall the well-established cardinal principles now recognised as applicable to a case of this description, where the Court is called upon to throw a protective cloak upon a purdanashin woman who is unable to protect herself.

It is well-settled that the Court, when called upon to deal with a deed executed by a purdanashin lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgment of this Court in *Mariam Bibee v. Ibrahim* (1), and on examination they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the confusion which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions in *Ranee Usmut Koowar v. Tayler* (2); *Tayler v. Ranee Asmedh Koonwar* (3); *Soondur Koomaree v. Kishoree Lal* (4); *Ram Pershad v. Ranee Phoolputtee* (5); *Kanai Lal v. Kamini* (6); *Manohar v. Bhagabati* (7); *Amutoonissa v. Alla Hafiz* (8); *Roop Narain v. Gugadhur* (9); *Pannalal v. Bamasundari* (10); *Doolee Chand v. Oomda Khanum* (11); *Bibee Rukhun v. Shakh Ahmed* (12); *Khas*

(1) (1916) 28 C. L. J. 306 (367).

(2) (1865) 2 W. R. 307.

(3) (1865) 4 W. R. 86.

(4) (1866) 5 W. R. 246.

(5) (1867) 7 W. R. 98.

(6) (1867) 1 B. L. R. O. C. J. 31, footnote.

(7) (1867) 1 B. L. R. O. C. J. 28.

(8) (1867) 8 W. R. 468.

(9) (1868) 9 W. R. 297.

(10) (1871) 6 B. L. R. 732 (741).

(11) (1872) 18 W. R. 238.

(12) (1874) 22 W. R. 443.



CIVIL.

1921.

Satis,

v.

Kalidasi.

Mookerjee, J.

*Mehal v. Administrator-General* (1); *Nistarini v. Nundo Lal* (2); *Keshub v. Radha Raman* (3); *Badiatannessa v. Ambika Charan* (4); *Bhuban Mohini v. Gajalakshmi* (5); *Behari v. Habiba* (6); *Achhan Kuar v. Thakur Das* (7); *Hakim v. Najiban* (8); *Sumsuddin v. Abdul* (9); *Tamarasherri v. Maranath* (10); *Mahadevi v. Nzelamani* (11); *Latchemy v. Lewcock* (12); *Chellummal v. Garrow* (13); *Narsummall v. Lutchmana* (14). Reference may also be made in this connection to the two decisions of the Judicial Committee in *Buzloor Ruheem v. Shumsoonnissa* (15) and *Geresh v. Bhuggobutty* (16). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and bona fides of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from purdah women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist; *Fuzzul v. Amjud* (17); *Ashgar v. Delroos* (18); on appeal from *Delroos v. Ashgur* (19); *Azeesoonnissa v. Baqur Khan* (20); *Tacoardeen v. Syed Ali* (21); *Sudhist Lal v. Sheobarat* (22); *Mahomed Buksh v. Hosseini* (23); *Lala Amarnath*

(1) (1901) 5 C. W. N. 505.

(2) (1899) I. L. R. 26 Calc. 891 (918).

(3) (1912) 17 C. W. N. 991.

(4) (1914) 18 C. W. N. 1133.

(5) (1915) 15 C. W. N. 1330.

(6) (1886) I. L. R. 8 All. 267.

(7) (1895) I. L. R. 17 All. 125.

(8) (1898) I. L. R. 20 All. 447.

(9) (1906) I. L. R. 31 Bom. 165.

(10) (1881) I. L. R. 3 Mad. 215.

(11) (1896) I. L. R. 20 Mad. 269 (273).

(12) (1800) 1 Strange N. C. 30.

(13) (1812) 2 Strange N. C. 159.

(14) (1802) 2 Strange N. C. 14.

(15) (1867) 11 M. I. A. 551 (586); 8 W. R. P. C. 3 (5).

(16) (1870) 13 M. I. A. 419 (431); 14 W. R. P. C. 7 (10).

(17) (1872) 17 W. R. 523.

(18) (1877) I. L. R. 3 Calc. 324.

(19) (1875) 15 B. L. R. 167.

(20) (1872) 10 B. L. R. 205.

(21) (1874) L. R. 11 A. 192; 13 B. L. R. 427.

(22) (1881) L. R. 8 I. A. 39; I. L. R. 7 Calc. 245.

(23) (1888) L. R. 15 I. A. 81; I. L. R. 15 Calc. 684.

CIVIL.

1921.

Satis

v.

Kalidasl.

Mookerjee, J.

v. *Achan Kuar* (1); *Deo Kuar v. Mani Kuar* (2); *Hakim v. Najiban* (3); *Annodea v. Bhuban* (4); *Shambati v. Jago* (5); *Ismail v. Hafiz* (6); *Kishori Lal v. Chuni Lal* (7); *Muhammad Kamil v. Imtiaz Fatima* (8); *Sujjad v. Wasir* (9); *Kali Buksh v. Ram Gopal* (10); *Mahabir Prasad v. Taj Begam* (11); *Asima Bibi v. Shamalanand* (12); *Mohammad Ali v. Ramzan Ali* (13); *Sunitibala v. Dhara Sundari* (14), and *Mati Lal Das v. Eastern Mortgage & Agency Co.* (15). The essence of the matter was tersely put by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (14) when he stated that the circumstances under which a purdasha woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. The principle thus enunciated was adopted as the basis of the judgment pronounced by Sir John Edge in *Mati Lal Das v. Eastern Mortgage Co.* (15). It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself; *Sunitibala v. Dhara Sundari* (14); *Mati Lal Das v. Eastern Mortgage & Agency Co.* (15); *Mohammad Ali v. Ramzan Ali* (13); *Kali*

(1) (1892) L. R. 19 I. A. 196; I. L. R. 14 All. 420.

(2) (1894) L. R. 21 I. A. 148; I. L. R. 17 All. 1.

(3) (1898) L. R. 25 I. A. 137; I. L. R. 20 All. 447.

(4) (1901) L. R. 28 I. A. 71; I. L. R. 28 Calc. 546.

(5) (1902) L. R. 29 I. A. 127; I. L. R. 29 Calc. 749.

(6) (1906) L. R. 33 I. A. 86; I. L. R. 33 Calc. 773; 3 C. L. J. 484.

(7) (1908) L. R. 36 I. A. 9; I. L. R. 31 All. 116; 9 C. L. J. 172.

(8) (1908-9) L. R. 36 I. A. 210; I. L. R. 31 All. 557; 10 C. L. J. 297.

(9) (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613.

(10) (1913) L. R. 41 I. A. 23; I. L. R. 36 All. 81; 19 C. L. J. 172.

(11) (1914) 19 C. W. N. 162 P. C.

(12) (1912) I. L. R. 40 Calc. 378 P. C.; 17 C. L. J. 303.

(13) (1920) 24 C. W. N. 977 P. C.

(14) (1919) L. R. 46 I. A. 272; I. L. R. 47 Calc. 175.

(15) (1920) L. R. 47 I. A. 265; 25 C. W. N. 265.

*Buksh v. Ram Gopal* (1); *Sajjat Husain v. Wazir Ali* (2); *Mahomed Buksh v. Hosseini* (3); *Mahabir Prasad v. Taj Begam* (4); *Azima Bibi v. Shamalanand* (5); *Ismail v. Hafiz* (6); *Hodges v. Delhi & London Bank* (7); *Bindubashini v. Giridhari* (8); *Alikjan v. Rambaran* (9); *Bhuban Mohini v. Gajalakshmi* (10); These, however, are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

The case before us belongs to the first class mentioned above, where the person who seeks to hold the lady to the terms of her deed is one who stands towards her in a relation of personal confidence. Here, he is the younger brother of her husband; the two brothers had lived jointly in amity, and Kalidasi who was some years older than Satis, was on the best of terms with her brother-in-law. On the death of her husband, Satis, though younger in age, became *ipso facto* the head of the joint family; she would thenceforth have to live under his care, look upon him as his natural protector and continue to repose confidence in him properly to safeguard her rights. This position is in absolute conformity with the normal structure of a joint Hindu family and is recognised by ancient texts of Hindu Law, such as the text of Narada XIII, 28, 29, cited by Jimutavahana in his *Dayabhaga* Chap. XI section 1 para. 64 which provides that when the husband is deceased, his kin is the guardian of his childless widow, and it is only when the husband's family becomes extinct or contains no male or is helpless that the kins of her own father are entitled to be her guardians. This is not archaic and obsolete law, but has been recognised in modern decisions: *Khudiram v. Bonwari* (11). In such circumstances, the principle formulated in section. III of the Indian Evidence Act applies, viz, that where there is a question as to the

CIVIL.

1921.

Satis

v.

Kalidasi.

Moo' erjee, J.

(1) (1913) L. R. 41 I. A. 23; I. L. R. 36 All. 81; 19 C. L. J. 172.

(2) (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613.

(3) (1888) L. R. 15 I. A. 81; I. L. R. 15 Calc. 684.

(4) (1914) 19 C. W. N. 162.

(5) (1912) I. L. R. 40 Calc. 378; 17 C. L. J. 303.

(6) (1906) L. R. 33 I. A. 86; I. L. R. 33 Calc. 773; 3 C. L. J. 484.

(7) (1900) L. R. 27 I. A. 163; I. L. R. 23 All. 137.

(8) (1909) 12 C. L. J. 115.

(9) (1910) 12 C. L. J. 357.

(10) (1915) 19 C. W. N. 1330.

(11) (1889) I. L. R. 16 Calc. 584.

Civil  
1921.  
Satis  
Kalidani  
Mookerjee, J.

good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that, whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage (Story on Equity Jurisprudence, section 308-323; referred to in Taylor on Evidence, section 151). As Story puts it, Courts of equity do not arrest or set aside an act or contract merely because a man of more honour would not have entered into it; there must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief. Equity demands in such circumstances the most abundant good faith (*uberrima fides*) in the transaction between the parties. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original right: *Baker v. Bradley* (1); *Bank of Montreal v. Stuart* (2); *In re Coomber* (3). We must not lose sight, however, of the fact that the question is one of substance and not merely one of burden of proof, and where, as in the present case, evidence has been adduced by both the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay; see the observations of Viscount Haldane in *Kundal Lal v. Begam* (4) and of Sir Lawrence Jenkins

(1) (1856) 25 L. J. Ch. 7; 7 DeG. M. and G. 597.

(2) (1911) App. Cas. 120. (3) (1911) 1 Ch. 726.

(4) (1918) 22 C. W. N. 937; P. C.

in *Sethuratnam v. Venkata* (1). We must now determine, how, the case before us stands when tested in the light of these principles.

Kedar Nath Ghosh, as previously stated, died on the 7th October, 1915. The partition deed now in controversy was executed on the 4th November 1915, that is, as the Subordinate Judge points out, twenty-seven days after the death of Kedar Nath Ghosh and three days before his Sradh ceremony had been performed; but the deed was based on a draft which had been prepared ten days earlier, on the 25th October, when the parties were about the middle of the period of mourning. The provisions of the partition deed have been correctly summarised by the Subordinate Judge. The document recites that the hardware business at 78, Clive Street as well as the house at Benares belonged jointly to Kedar Nath and Satis Chandra in equal shares and that the widow gave up her claim to those properties as also to the remainder of the joint estate, in consideration of the benefits granted to her, which may be enumerated as follows: (a) Kalidasi would become absolute owner of the house at Benares as also the house at Howrah, No. 8, Kaliprasad Chakrabarti Lane; (b) that Satis would pay to Kalidasi Rs. 20,000 by annual instalments of Rs. 2000 each, the entire sum to be charged on the ancestral dwelling house at 3 & 4 Kaliprasad Chakrabarti Lane; (c) that Satis would pay, within three months from the date of execution of the deed, Rs. 2000 to Nalinibala and Rs. 4000 to Chinabala; (d) that Satis would pay Rs. 2500 on the occasion of the marriage of each of the two daughters of Chinabala, named Radharani and Umasasi; and (e) that Satis would maintain Kalidasi, her two daughters and the granddaughter, in the family dwelling house, and if Kalidasi should live apart, Satis would pay her Rs. 10 per month for her maintenance and after her death Rs. 10 per month for the maintenance of her two daughters, Nalinibala and Chinabala. The deed recites on the face of it, that this distribution of the family estate gave effect to the intentions of Kedar Nath Ghosh as expressed immediately before his death. The case for the plaintiff is that this allegation, which goes to the root of the entire transaction, is unfounded. It is, consequently, necessary to investigate the incidents which actually happened before the death of Kedar Nath Ghosh. The evidence makes it abundantly clear that Kedar Nath Ghosh did intend to make a testamentary disposition of his properties during his last illness. He gave instructions for the preparation of a draft will, which was drawn up by one Aghor Nath Maiti. A fair copy was then made by one

(1) (1910) L. R. 47 I. A. 76; 1 L. R. 43 Mad. 567.

CIVIL.

1921.

Satis

v.

Kalidasi.

Mookerjee, J.

CIVIL.

1915.

Satis

Kalidasi,

Mookerjee, J.

Akshay Kumar Ghose. The intended will was, however, never executed; for when the document was taken to Kedar Nath Ghosh for signature, it was found that he had lost consciousness. - He never regained consciousness and the end came immediately afterwards. While he was on his death-bed, thus lying unconscious, a discussion took place among the persons present as to what steps might be taken to carry out the projected disposition of the estate. One Badal Chandra Ghosh, a pleader, suggested that after the death of Kedar Nath Ghosh, a deed of family arrangement might be executed between Satis Chandra Ghose and Kalidasi, and he forthwith prepared a draft for such a deed. No further steps appear to have been taken for some days after the death of Kedar Nath Ghosh, but on the 25th October, 1915, the draft of a partition deed was drawn up by one Nilmani Bose and was executed as well by Kalidasi as by Satis Chandra Ghosh. On the basis of this draft, a fair copy was subsequently prepared, and the partition deed in its final form, which is the subject matter of this litigation, was executed on the 4th November, 1915. It may be stated here that as Kalidasi was illiterate, her name was at the request of Satis, signed on the draft as well as on the final deed by her daughter Chinabala who, as the evidence shows, is a half crazy girl and herself writes Bengali very imperfectly, as may be seen from an inspection of the original signatures on the record. The draft of the intended will made by Aghor Nath Maiti, the draft of the partition deed made by Nilmani Bose, and the partition deed as executed and registered, have been produced; but the fair copy of the intended will and the draft of the deed of family arrangement prepared by Badal Chandra Ghosh have not been produced; there can be little doubt, as will presently be seen, that they have been designedly withheld by the defendant, because that would have materially weakened his case. The draft of the will is full of alterations and interlineations; these were not indicated in the paper-book placed before the Court, and the hearing had to be adjourned, so that the Court might be supplied with a fresh translation of the deed indicating the draft in its original form as also the various alterations and interlineations. An inspection of the draft in this form makes manifest the vital changes introduced into the deed. This inevitably raises the question, whether the draft in its original form or the draft as altered corresponded to the actual instructions given by Kedar Nath Ghosh. The Subordinate Judge has held that the draft in its original form contained the instructions given by Kedar Nath Ghosh before his death, and that the changes introduced

into the draft did not form part of those instructions. I feel no doubt that the view taken by the Subordinate Judge is correct. It is needless to determine, how far the instructions given by Kedar Nath Ghosh were voluntary, or how far, in the precarious state of his health, he acted under the influence of his brother. The fact remains that to some at any rate of the persons present the terms seemed ungenerous, and one of them, Asutosh Banerjee, pressed for liberal treatment of his wife and children. Let it be assumed, however, for our present purpose, that the instructions were voluntarily given; these were correctly represented by the contents of the draft as drawn up by Aghor Nath Maiti. The changes in the draft were, in my opinion, no part of the instructions; indeed, it has not been definitely disclosed by the defendant when and by whom the changes were made. It was rather doubtfully suggested that they were in the handwriting of Asutosh Banerjee, who was present in Court at one stage but was not examined. If, now, we compare the draft will in its original form, as representing the last wishes of Kedar Nath Ghosh, with the partition deed in its final form which purports to give effect to those intentions, what is the result? In the original draft will, we find that Rs. 20,000 was to be paid to Kalidasi, in one instalment; in the partition deed, we find that the payment was to be spread over ten years; this accords with the interlineation. Again, according to the original draft will, Kalidasi was to take an absolute right in the two houses at Benares and Howrah; by the partition deed, a life estate is conferred on Kalidasi and her two daughters; this also accords with the interlineation. There is another significant alteration which cannot be overlooked; wherever in the draft will, the singular word *Amar* (my) occurred, it has been altered into the plural *Amader* (our). In my opinion, there is ample indication that the draft will was so altered, after the death of Kedar Nath Ghose, that it might serve as a draft for a partition deed to be executed by two persons, namely, Kalidasi and Satis Chandra Ghose. This also explains why the fair copy of the will made by Akshay Kumer Ghose and the draft deed of family arrangement made in accordance therewith by the pleader Badal Chandra Ghosh, have both been withheld; those two documents were in agreement with the draft will in its original form and if they had been produced, they would have completely demolished the theory that the draft will with alterations represented the last intentions of Kedar Nath Ghose. This fits in further with the significant circumstance, emphasised by the Subordinate Judge, that the intended will of Kedar Nath Ghose was never shown to the

CIVIL.

1931.

Satis

v.

Kalidasi

Mookerjee, J

• CIVIL.

1931.

Satis.

Kalidasi.

Mooharjee, J.

plaintiff. We may also observe that the partition deed in its final form departs, in at least one particular, from its draft which also contains alterations and interlineations, namely, that the maintenance for Kalidasi and her two daughters at Rs 20 per month is reduced to Rs 10 for herself and nothing for her daughters until her death. There is no explanation on whose authority, the alterations in the draft deed of partition was made by Nilmoni Bose who has not been examined on the plea of absence at Waltair. In my view, there is no escape from the conclusion that the partition deed, as executed, departs in very material particulars from the true intentions of Kedar Nath Ghose as expressed shortly before his death, and that as the assent of Kalidasi thereto was secured on the untrue representation that its provisions carried out the last wishes of her husband the deed was in essence obtained from her by false pretences and must on this ground alone be set aside. But there are other grounds equally weighty, which destroy the operative character of the deed.

The schedule to the partition deed sets out the values of the properties. The Subordinate Judge has held it conclusively proved, by local investigation and the other evidence adduced in the case, that the properties reserved for Satis were grossly undervalued, while the two houses given to the plaintiff were overvalued. This conclusion of the Subordinate Judge is amply sustained by the evidence, and he is undoubtedly right in his view that the properties taken by Satis are the cream of the estate while those assigned to the plaintiff are the worst of all. It is further important to note that inasmuch as Satis takes under the deed the entire joint estate, with the exception of what is expressly given to Kalidasi, it is an obviously damaging circumstance that some valuable properties are not mentioned at all in this deed of partition. Upon the question of undervaluation, the most flagrant instance is the value of the stock-in-trade of the hardware business and the workshop appurtenant thereto, which is stated in the schedule to the deed to be only Rs. 31,000, but is now shown to be at least Rs. 60,442. Another instance, equally striking, is that of premises 10 and 12, Raja Woodmunt Street and 77-2 Clive Street which are described as worth Rs. 1,001 only; this ignores what was well known to Satis, namely, that the price had been fixed at Rs. 20,000 and that Kedar had paid Rs. 15,000 in part payment to the vendor to satisfy a mortgage on the property. A third instance, in no way less impressive is that of the ancestral dwelling house which was valued Rs. 21,000, but has now been found to be worth Rs. 35,746. It is



significant that all these instances of under-valuation relate to properties taken by Satis; on the other hand, the value of what has been assigned to Kalidasi has been demonstrated to be in fact much less than the estimated amount. As an instance of total omission, mention may be made of an incident which is by no means creditable to Satis. It appears, that after the death of Kedar, he signed the name of Kedar and on the 18th October, 1915, withdrew from the National Bank of India, a sum of Rs. 11,200 which stood in the name of Kedar, and deposited the sum in his own name in the Mercantile Bank of India. No mention was made of this amount in the partition deed. In the face of these circumstances, it is impossible to hold that the defendant observed that "utmost, degree of good faith" which his sister-in-law was entitled to expect from him in his dealings with her, on well recognised equitable principles. This by itself would manifestly justify the cancellation of the deed.

But it has been strenuously argued by the defendant that the lady had the benefit of independent advice and cannot consequently impeach the transaction. In my opinion, there is no solid foundation for this contention. There is no satisfactory evidence to show that Rajkumar Deoti, the brother of Kalidasi, did in fact advise her in this matter, or was able and willing to give her the requisite assistance. To enable us to appreciate the situation of the parties at the time, the successive events may be conveniently set out in chronological order :

- 7th October, 1915—Kedar Nath Ghosh died.
- 25th October, 1915—Draft Partition deed signed.
- 4th November, 1915—Partition deed executed.
- 6th November, 1915—Sradh ceremony of Kedar Nath Ghosh performed.
- 22nd November, 1915—Rajkumar borrowed Rs. 1000 from Satis.
- 8th December, 1915—Partition deed registered.
- 23rd January, 1916—Rajkumar took certified copy of partition deed from Registration office.
- 26th January, 1916—Rajkumar borrowed Rs. 2000, from Satis.
- 31st January, 1916—Kalidasi applied for succession certificate in respect of Insurance Policy on life of her husband (not included in partition deed).
- 23rd February, 1916—Kalidasi applied to include in succession certificate G. P. Notes for Rs. 7,500 (not mentioned in partition deed).

CIVIL.

1921.

Satis

v.

Kalidasi.

Mookerjee, J.

CIVIL.

1921.

Satis

v.

Kalidasi

Mookerjee, J.

11th March, 1916—Proposed supplementary deed of family settlement drawn up by Satis.

8th April, 1916—Satis objected to grant of certificate to Kalidasi for G. P. Notes.

10th April, 1916—Satis applied for certificate for G. P. Notes.

12th May, 1916—Satis sued Rajkumar to recover the sums advanced to him (Suit No. 103 of 1916).

13th May, 1916—Properties of Rajkumar attached before judgment at the instance of Satis.

16th May, 1916—Rajkumar obtained power of attorney from Kalidasi.

20th May, 1916—Applications for succession certificate made by Satis and Kalidasi heard. Satis produced partition deed. Satis granted certificate for G. P. Notes ; Kalidasi granted certificate for Life Insurance Policy.

28th June, 1916—Kalidasi instituted present suit.

12th July, 1916—Satis appointed Receiver of hardware business.

11th July, 1917—Order for grant of certificate to Satis in respect of G. P. Notes set aside on appeal.

It is by no means clear from the evidence on the record that Kalidasi acted under the advice of her brother. Rajkumar was one of the executors named in the will intended to be executed by Kedar Nath Ghosh. He was no doubt aware of the terms of the will, and it is improbable that he should have been a party to variations therefrom to the prejudice of his sister. This is confirmed by the significant fact that as early as 23rd January, 1916, Rajkumar took a certified copy of the partition deed from the Registration office, evidently with a view to take steps to secure to his sister her full rights in the estate left by her husband. It is further remarkable, if Rajkumar was really present throughout and advised his sister, that he should not have read over the deed and explained it to her, become an attesting witness thereto, or even identified her before the Registering Officer. Nor can we overlook the fact that Kamini Kumar, the eldest brother of Kalidasi and Rajkumar, is conspicuous by his absence from the scene. It has moreover been suggested on behalf of the plaintiff that Rajkumar was perhaps more anxious to improve his own prospects than to safeguard the interest of his sister. There is no direct evidence to prove this hypothesis ; though it must be conceded that the circumstance that Rajkumar was able to borrow Rs. 3,000 from Satis shortly afterwards, is calculated to excite suspicion. On the other hand, it has been suggested on behalf of the defendant that the

present suit has been engineered by Rajkumar to wreck his vengeance on Satis who had enforced his claim for recovery of the loan. This theory is not improbable; but even if true, it does not justify the inference that Kalidasi has made an unfounded claim against Satis, who might perhaps have postponed the evil day for a while, if he had been diplomatic enough to keep Rajkumar under obligation for a longer period. I am not unmindful that as observed by Fletcher Moulton, L. J. in *In re Coomber* (1), independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and that from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction. I see no reason to doubt the correctness of the conclusion of the Subordinate Judge that Kalidasi had not the benefit of such independent advice from Rajkumar or any other person. It is, I think, also clear that even if Rajkumar be assumed to have been entirely beyond the sphere of influence of Satis, he was really not able to give the requisite advice. To secure a fair transaction, a full appreciation by the lady of the value, and nature of her rights was essential. No doubt, as pointed out by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (2), it is not necessary to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the compromise should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed. Tested from this point of view, the evidence does not show that Rajkumar himself was fully acquainted with the facts, duly appreciated the effect of the transaction and was able to advise his sister. To mention one aspect only: the deed as executed might well raise the point whether the transaction was a device for division of the estate between a limited owner and a reversioner and whether Satis could validly transfer to Kalidasi, as he did, his reversionary interest in two of the properties; indeed, the question involved was precisely such as required consideration by a lawyer, in view of the recent pronouncements of the Judicial Committee in *Khunni v. Gobinda* (3); *Amrita Narayan*

CIVIL.

1921.

Satis  
v.  
Kalidasi.

Mookerjee, J.

(1) (1911) 1 Ch. 723 (730).

(2) (1919) L. R. 46 I. A. 272; I. L. R. 47 Cal. 175.

(3) (1911) L. R. 38 I. A. 88; I. L. R. 33 All. 356; 15 C. L. J. 575.

Civil.  
1921.  
Satis  
v.  
Kalidasi.  
Mookerjee, J.

v. *Gaya Singh* (1); *Rangasami v. Nachiappa* (2); *Sureshwar v. Maheshwari* (3) and other cases reviewed in *Annada Mohan Roy v. Gour Mohon Mullick* (4). Although it may be conceded that, as pointed out in *Buchi v. Jagapathi* (5), the presence of a professional adviser cannot be deemed necessary in every case, the Subordinate Judge has properly commented on the fact that while a pleader was called to witness the execution of the intended will of Kedar Nath Ghose and two pleaders were called to witness the registration of the partition deed, not a single pleader, not even a competent disinterested person, was called to advise Kalidasi in a matter of such vital moment to her, either at the time when her assent was obtained to the draft partition deed or at the time when the deed was executed. No doubt, as pointed out by Jenkins C. J. in *Keshub v. Radha Raman* (6), the absence of advice would not have by itself necessarily vitiated the transaction, if it had been otherwise established to be righteous, that is, such as a rightminded person might be expected to do. All the indications in the present case, however, point to a contrary conclusion; and from this point of view, much weight cannot be attached to the evidence which shows that the draft partition deed was read over and explained to Kalidasi by one Fakir Chand Ghosh, who himself, as is clear from his testimony, did not fully appreciate the nature and effect of the transaction. On the other hand, there is abundant indication that full advantage was taken by Satis of the deeply distressed condition of his sister-in-law, who had shortly before lost both her sons-in-law, and had hardly recovered from the shock, when she lost her husband. Before the period of mourning was over, her brother-in-law expedited the execution of the deed with what cannot but be characterised as indecent haste. During this period of mourning, arrangements had to be made for the performance of the prescribed ceremonies on a suitable scale. The lady was anxious that the poor of the locality and the adjoining villages should be fed in a proper style. This request, somewhat insistently made, was utilised to put pressure upon her and to make her agree to terms which her brother-in-law considered advantageous to himself. This furnishes an illustration of what is felicitously described by Lord Macnaghten in *Mahomed Buksh v. Hosseini Bibi* (7) as "a subtle form of undue

(1) (1917) L. R. 45 I. A. 35; I. L. R. 45 Calc. 550.

(2) (1918) L. R. 46 I. A. 72.

(3) (1920) L. R. 47 I. A. 233.

(4) (1920) 33 C. L. J. 457; 25 C. W. N. 456.

(5) (1884) I. L. R. 8 Mad. 304 (319).

(6) (1912) 17 C. W. N. 991.

(7) (1888) L. R. 15 I. A. 81 (91); I. L. R. 15 Calc. 684.

influence." There can be little doubt that Satis himself must have realised that the deed had been taken by him from his sister-in-law under circumstances which made it open to successful attack; this alone affords a plausible explanation of his conduct in the succession certificate cases, where he did not set up the partition deed till a very late stage of the proceedings. But weightier than all these circumstances put together, we have the outstanding fact that Satis, on his own initiative, took steps to prepare, at his expense, a supplemental deed of family settlement to rectify to some extent the unfairness of the partition deed he had taken from his sister-in-law; the attempt, however, came too late. It is difficult to conceive what more convincing proof could have been brought forward to establish the true character of the deed challenged by the plaintiff.

It has finally been urged on the merits that the partition deed was in essence a deed of family settlement and should consequently be supported, even though there were no rights actually in dispute at the time of making it; in such cases, as was said in *Upendra Nath v. Bindeshri* (1) and *Mariam Bibee v. Ibrahim* (2), the Court should not scan with much nicety the quantum of consideration. The principle invoked may be conceded and is, as pointed out in *Helan v. Durga Das* (3), and *Satya Kumar v. Satya Kripal* (4), supported not only by the authority of *Williams v. Williams* (5), and *Lucy's case* (6), but also by the decision of the Judicial Committee in *Gajapathi v. Gajapathi* (7); *Mantappa v. Baswunt* (8); *Mewa v. Hulas* (9), *Girindra v. Trailakhya* (10); *Mahamed Iman Ali v. Husain* (11); *Khunni v. Gobinda* (12). But it is equally well-settled that, as James L. J. puts it in *Moxon v. Payne* (13), to make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection; one side must not know more about the matter than the other, unless what he knows could not possibly

CIVIL.

1921.

Satis  
v.  
Kalidasi.

Mookerjee, J.

(1) (1913) 22 C. L. J. 452 (476).

(2) (1916) 28 C. L. J. 306 (369).

(3) (1906) 4 C. L. J. 323.

(4) (1903) 10 C. L. J. 503.

(5) (1867) L. R. 2 Ch. App. 294.

(6) (1853) 4 DeG. M. &amp; G. 356; 102 R. R. 163.

(7) (1870) 13 M. I. A. 497 (512); 14 W. R. P. C. 33; 6 B. L. R. 202.

(8) (1871) 14 M. I. A. 24 (36).

(9) (1874) L. R. 1 I. A. 157; 13 B. L. R. 312.

(10) (1892) L. R. 21 I. A. 35; 1 I. L. R. 20 Calc. 373.

(11) (1898) L. R. 25 I. A. 161; 1 I. L. R. 26 Calc. 81.

(12) (1911) L. R. 38 I. A. 88; 1 I. L. R. 33 All. 356; 15 C. L. J. 373.

(13) (1873) L. R. 8 Ch. App. 881; 43 L. J. Ch. 240.

CIVIL.  
 1931.  
 Satis  
 v.  
 Kalidasi.  
 Mookerjee, J.

have affected the other party's decision: *Gilbert v. Endean* (1); *Maynard v. Eaton* (2). This accords with the rule enunciated in *Gordon v. Gordon* (3), which was repeatedly argued before Lord Eldon, namely, that a family arrangement to be operative must be without fraud; it would not be supported if founded on mistake of either party to which the opposite party was an accessory; or if either party has been misled by the concealment of material things, for the essence of the matter is mutual communication of all relevant circumstances. To the same effect are the decisions in *Hoghton v. Hoghton* (4); *Lawton v. Campion* (5); *Bentley v. Mackay* (6), which show that a Court of equity will not permit a family arrangement to bind the parties when the transaction has been unfair and founded upon falsehood or misrepresentation. Tested in the light of these principles, the position of the defendant is full of insoluble difficulties from which no ingenuity on the part of the most skilful legal adviser can extricate him.

As a last resort, it has been contended on behalf of the defendant that no relief should be granted to the plaintiff in the present suit as framed, inasmuch as the plaintiff who alleged fraud can succeed only on proof of the fraud specified in the plaint, and no variation between pleading and proof can be allowed. In support of this position, reference has been made to the following passage from the judgment in *Bansiram v. Pan-chami* (7). "Two principles, it is well settled, are applicable in these circumstances. In the first place, as pointed out by the Judicial Committee in *Gunga Narain v. Tyluck Ram* (8), where reliance was placed upon the observations of Selborne L. C. in *Wallingford v. Mutual Society* (9), when a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated: *Gilbert v. Lewis* (10); for, in the language of Fry, J. in *Redgrave v. Hurd* (11), it is only fair play between man and man that the defendant should know what is charged against him: *Clydesdale*

(1) (1878) 9 Ch. D. 259.

(2) (1874) L. R. 9 Ch. 414; 43 L. J. Ch. 641.

(3) (1816 21) 3 Swan. 400; 19 R. R. 230.

(4) (1852) 15 Beav. 278; 92 R. R. 421.

(5) (1854) 18 Beav. 87.

(6) (1862) 31 Beav. 143; on appeal (1862) 4 DeG. F. & J. 279.

(7) (1914) 20 C. W. N. 638.

(8) (1888) L. R. 15 I. A. 119; I. L. R. 15 Calc. 533.

(9) (1880) 5 App. Cas. 685.

(10) (1862) 1 DeG. J. & S. 38 (49).

(11) (1881) 20 Ch. D. 146.

*Bank v. Paton* (1); and *Lawrence v. Norreys* (2). In the second place, a charge of fraud must be substantially proved as laid, and, when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it: *Abdul Hossein v. Turner* (3); the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings, is strictly enforced when the plaintiff relies upon fraud: *Wilde v. Gibson* (4), and *Hickson v. Lombard* (5). But there is plainly no real substance in the contention in the circumstances of the present litigation. The essence of the case for the plaintiff is that the defendant, who was her trusted brother-in-law, took advantages of her helpless situation as an illiterate purdanashin Hindu widow and obtained her assent to a deed, the true effect whereof was not appreciated by her as she had no competent independent advice. It cannot thus be seriously maintained that there has been an infringement of the rule formulated by Lord Westbury in *Eshen-chunder v. Shamachurn* (6), by Sir Barnes Peacock in *Mylapore v. Yeo Kay* (7), and by Sir Lawrence Jenkins in *Malraju v. Venkataradri* (8), that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; nor can it be suggested that there has been any violation of the elementary rule of procedure laid down by Sir Barnes Peacock in *Abdul Hossain v. Turner* (9), and by Lord Shaw in *Fal Gangadhar v. Shrinivas* (10) that a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof be substituted for it. We must further bear in mind that every variance between pleading and proof is not fatal: the Court must carefully consider whether, in the words of the Judicial Committee in *Radha Mohun v. Jadomonee* (11), the objection is one of form or of substance. The rule that the allegation and the proof must correspond is intended to serve a double

CIVIL.

1921.

Satis

v.

Kalidasi.

Mookerjee, J.

(1) (1896) A. C. 381.

(2) (1890) 15 A. C. 210 (221).

(3) (1887) L. R. 14 I. A. 11; I. L. R. 11 Bom 620.

(4) (1848) 1 H. L. C. 605.

(5) (1866) L. R. 1 H. L. 324.

(6) (1866) 11 M. I. A. 7; 6 W. R. P. C. 57.

(7) (1887) L. R. 14 I. A. 168; I. L. R. 14 Calc. 801.

(8) (1910) 33 C. L. J. 171; 25 C. W. N. 654 P. C.

(9) (1887) L. R. 14 I. A. 111; I. L. R. 11 Bom. 620.

(10) (1915) L. R. 42 I. A. 135 (151); I. L. R. 39 Bom. 441 (467); 22 C. L. J. 1 (19).

(11) (1875) 23 W. R. 369.

Civil.  
 1921.  
 Satis  
 v.  
 Kalidasi.  
 Mookerjee, J.

purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Tested from these points of view, the objection urged by the defendant proves to be groundless. There is no room for doubt that the contending parties fully appreciated the real points in issue and have adduced all the material evidence. The fundamental point in controversy was really of a very simple character, namely, what were the circumstances under which the partition deed was executed? Each side had full opportunity to give in minute detail its own version of the incidents, and the Court was called upon to determine the true state of things from the conflicting narratives. There is plainly no question of surprise; but if it were necessary to adhere to matters of form with the strictest accuracy, the plaint could well have been amended to enable the Court to do that substantial justice between the parties for which alone Courts exist: *Mohummud Zahoor v. Rutta Koer* (1); *Sunitibala v. Dhara Sunduri* (2); *Charan Dás v. Amir Khan* (3), and *Ma Shave Mya v. Maung Mo* (4). In this connection, a well-known passage from the judgment of James. L. J., in *Moxon v. Payne* (5), may be usefully recalled. "A great part of the argument which was addressed to us on behalf of the defendant Payne was, that the case alleged against him by the bill was one of gross and premeditated fraud, and that unless the actual fraud as alleged was proved, the bill must fail. It was contended that the plaintiffs were bound to make out, and had failed to make out, the case alleged in the tenth paragraph of the bill. It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in

(1) (1867) 11 M. I. A. 468 (485); 9 W. R. P. C. 9.

(2) (1919) L. R. 46 I. A. 272; 1 L. R. 47 Calc. 175.

(3) (1920) L. R. 47 I. A. 255.

(4) (1921) decided on the 28th January by the P. C.

(5) (1873) L. R. 8 Ch. App. 881 (887).



such a suit. It is at most a rhetorical exaggeration, which a person who commits the fraud, has no right to complain of. If a man robs his fellow traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial. Much the same line of defence was taken in the case of *Huguenin v. Baseley* (1), and it may be worth while to quote what Lord Eldon said in that case: "I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented...I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to shew that this deed cannot stand, if the whole transaction taken together cannot stand."

In my judgment, the Subordinate Judge was unquestionably right in his conclusion that the defendant obtained the partition deed from the plaintiff by an untrue representation that its terms were in conformity with the last wishes of her husband, as well as by a concealment of the true extent of the assets of the family business and the value of the family properties; he also took advantage of her distressed condition during the period of mourning immediately after she had lost her husband; she had further no competent independent advice as to the nature, value and extent of her rights in the estate left by the deceased and the true effect of the deed upon her position as his heiress. In these circumstances, she was entitled substantially to the reliefs granted by the decree of the Subordinate Judge.

The result is that the decree of the trial Court must be affirmed and this appeal dismissed with costs. The memorandum of cross-objections is rejected without costs.

**Buckland. J.:**—This appeal is against the judgment and decree in a suit brought by one Srimaty Kalidasi Dasi to have it declared that

CIVIL.

1921.

Satis

v.

Kalidasi.

Mookerjee, J.

Civil.

1921.

Satis

v.

Kalidasi.

*Buckland, J.*

a deed described in the plaint as a partition deed, executed by her on the 4th November 1915 in favour of the appellant Satis Chandra Ghose is fraudulent and void and to have it cancelled and for partition of the immovable property mentioned in the schedule to the plaint and to recover a hardware business in Calcutta to which she alleges she is entitled as widow of her deceased husband. One Gobinda Chandra Ghose who died in November 1913 left two sons—Kedar Nath Ghose and Satis Chandra Ghose. The latter is the appellant. Kedar Nath was the husband of the plaintiff and by her he had two daughters—Chinabala and Nalinibala. The plaintiff has two brothers called Kamini Kumar and Raj Kumar and this completes the list of the relatives of the parties whose names have been introduced into the case. The learned Subordinate Judge has found that the hardware business was the property of Gobinda Ghose on whose death his two sons inherited it jointly. The respondent who claimed the whole of this business has abandoned his cross-objections on this point and it is not necessary further to consider the question.

The respondent's case is that shortly after the death of her husband Kedar Nath Ghose which took place on the 7th October, 1915 the appellant came to her and asked her to entrust him with the management of the hardware business. To this she says that she agreed. The deed of the 4th November 1915 was prepared; it was signed by the respondent by the pen of her daughter Chinabala; no explanation of its terms was given, nor was the deed read over to her. On the 8th December it was registered, again without explanation. After registration the respondent disclosed the existence of the deed to her brother Raj Kumar who took her to task and said that he would obtain a copy of it and see her about the matter. This Raj Kumar did and told her that Satis had defrauded her of everything. Subsequently on the 28th June 1916 she filed this suit. This is the broad outline of the respondent's story as told by her and her witnesses. It is not necessary to analyse this case in detail because the Subordinate Judge himself has paid very little attention to it. It is not possible to say from his judgment what view he takes of it, for he deals exclusively with the case made by the appellant. He has refused to accept the appellant's case in all its details, but he has treated it as representing more or less what took place, and he finds in language admitting of no ambiguity that taking the case made by the appellant substantially to represent what occurred, fraud was practised on the res-

pondent in whose favour he has made a decree setting aside the deed of the 4th November, 1915.

It has been argued by the learned Advocate-General on behalf of the appellant that in a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and that even should the Court find that fraud was practised, if such fraud is other than the fraud alleged the defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man, or, stated more appropriately to this case, where a Pardanashin lady is not concerned. But where a pardanashin lady is involved, other and equally well-known rules have to be applied and conformity with them has to be established. As I read the judgment of the learned Subordinate Judge, it is according to these rules that he has found that the appellant fails even assuming his case to be true. I propose therefore to state the history of the matter and examine it from this point of view.

For some years before his death Kedar Nath Ghose had been an invalid and at the time of his death he was bed-ridden. He had spoken to his wife some two or three days before his death about a will and on or about the 28th or 30th September a draft will was prepared for him. The materiality of the will which Kedar Nath intended to execute arises from the circumstance that the case put forward by the appellant in his written statement and in the evidence is that it was in order to give effect by deed to the wishes of her deceased husband, which the intervention of death prevented him from carrying out by will, the respondent executed the instrument which is the occasion of these proceedings. The draftsman of the will was Aghore Nath Maity, a man who describes himself as a trader, dealing in building materials and also with deeds, who has been called as a witness for the appellant: Aghore Maity's evidence is that he was summoned by one Ashutosh Banerjee to write out the will: that Kedar Babu stated his intentions at some of which Ashutosh Banerjee protested and after discussion with Asutosh Banerjee he wrote out the terms. This draft has been produced. It contains a number of alterations but it has not been proved by whom these alterations were made. Aghore Maity did not make them though he says they were made on the same day as the draft was written, but he cannot say by whom. The suggestion is that the alterations were made by Asutosh Banerjee who however has not been called by either side though present at the trial of the suit. The importance of these alterations will appear later. The will was fair copied on the 6th October. This appears from the

CIVIL.

1921.

Satis

v.

Kalidash.

Buckland, J.

CIVIL.

1921.

Satis

v.

Kalidasi.

*Buckland, J.*

evidence of the appellant, and of a witness named Boloram Ganguly, an attesting witness to the deed in suit. This man says that on the day preceding the death of Kedar he went to Kedar's house where he saw Akhoy Ghose, Jotin Ghose, Shyama Charan Bhaduri, Asutosh Banerjee and Raj Kumar Deoti. The document was being dictated by Akhoy Ghose to his son Jotin who was writing a fair copy. This fair copy has not been produced and no explanation of the omission to produce it is forthcoming. On the 7th October Kedar Nath Ghose died without having executed the will though on the morning of that day the several persons whom I have named, a pleader called Badal Chandra Ghose, the doctor Sarat Chandra Das, and a person of the name of Pulin Behary Mondal had collected, most of them for the purpose of being present at the execution of the document. But nothing could be done as Kedar had become unconscious. Kedar died and did so intestate. The appellant and also Asutosh Banerjee and Jaharilal Bhaduri then asked what was to be done. Whereupon a suggestion was made by Badal Chandra Ghose that as the will could not be executed a deed which in his evidence he called a deed of family arrangement might be executed in its terms. This suggestion was made in the absence, it is to be observed, of the respondent. All of this is most significant: It suggests the thought that the death of Kedar Nath Ghose intestate was regarded by these persons as a catastrophe. So far as he could do ought to remedy it, Badal Chandra Ghose lost no time and he then and there as he says dictated, a draft to Akhoy Ghose's son Jotindra. This draft too is not forthcoming nor is its absence explained. Some few days later the appellant suggested to the respondent that a deed should be executed. He made the suggestion at a time when expenses to be incurred for the *sradh* of Kedar Nath Ghose were under discussion. The respondent was most anxious that a feeding of the poor should take place. This appears to have afforded to the appellant the opportunity which he desired. For he demurred and said he would consent if the respondent would execute what he called a family arrangement. A number of persons whom it is unnecessary to specify, their names recur throughout the evidence at each stage of the incidents leading up to the final conclusion, also met and discussed the matter with the appellant and respondent. As regards this discussion suffice it to say that it related to arrangements regarding the immovable property and that according to the witness Fakir Chandra Ghose the respondent intimated that if the *sradh* would only cost Rs. 5000 or Rs. 6,000, she would execute a

deed in accordance with the terms of the will which her husband had proposed to execute. There appears to have been more than one such interview with the respondent as the appellant says that terms were discussed in his presence while Fakir Chandra Ghose says "We came back and told Satis that Kalidasi had agreed." It is not a simple matter to disentangle the evidence as to these several interviews, but on each occasion the appellant's adherents were present and the impression on my mind, whether or not she was alive to her own interests, or advised as to them, a point I shall deal with hereafter, is that the respondent was being importuned in the interests of the appellant to put her hand to the document which he was anxious to obtain. The appellant says that the respondent agreed to certain terms and accordingly in furtherance of the project on the following day a draft of the will of Kedar and the draft deed prepared by Badal Babu and "perhaps also the fair copy of the will" were made over to an individual of the name of Nilmony Bose to prepare a "partition deed" in the terms arranged. Nilmony Bose has not been called as a witness and the explanation given for his absence from the witness box, that he was travelling to Waltair, is wholly insufficient. His evidence might have thrown some light upon the failure to produce the draft prepared by Badal Chandra Ghose and the fair copy of the will. The importance of the omission to produce these papers lies in the fact that as already stated it is the appellant's case that subject to such alterations as were agreed upon between him and the respondent the object of the deed was merely to give effect to the wishes of Kedar Nath Ghose which the deceased had not been able to carry out before his death. The learned Subordinate Judge has found that the alterations in the draft of the will were interpolated subsequently in order to bring the will into conformity with the partition deed. The alterations in the draft in various respects are not such as one would expect to find in a will but are such as might well find a place there if the draft will had been used as a rough draft for the purpose of engrafting upon it the deed of partition. This does not improve the position for the appellant and it is not necessary to come to any definite conclusion one way or the other. But the appellant's case being what it is, that the draft will as altered and the deed in suit represent the testamentary wishes of the deceased, the omission to produce the fair copy of the will and the draft prepared by Badal Chandra Ghose suggests the inference that were they produced they would show that neither the fair copy of the will nor the draft partition deed were in accord-

CIVIL.

1921.

Satis

v.  
Kalidasi.

Buckland, J.

CIVIL.

1921.

Satis

v.

Kalidasi.

*Buckland, J.*

ance with the will which Kedar Nath Ghose intended to execute. This omission and the failure fully to explain their non-production throw the gravest suspicion on the appellant's case.

About the time when Nilmoni Bose has been told to prepare a draft, in particular on the 19th October, the appellant, who had charge of the hardware business in Calcutta drew from the National Bank of India practically the whole of the cash balance of the business, which stood in Kedar's name amounting to Rs. 11,000 and transferred it to an account in his own name at the Mercantile Bank of India. At that time, of course, the respondent knew nothing about this. It came to light in circumstances to which I shall presently refer. Four or five days after receiving instructions Nilmoney produced a draft which according to the appellant was read over and explained to the respondent on the 25th October 1915 in the presence of some ten persons by Fakir Chandra Ghose, who also explained it. The draft was approved and executed by the respondent through her daughter Chinabala. Fakir again lent his services in the same manner some days later when the fair copy was executed by the parties in similar fashion as regards the respondent. That took place on the 4th November 1915. On the 8th December the deed was registered. A vakil of the name of Bhupendra Nath Bose has been called to support this part of the case and he produced a diary in which he had made a note as to his presence on the occasion and the reading over of the document to the respondent by one Shayama Charan Bhaduri. There is nothing in the note to show that the document was explained to the respondent on that occasion in the manner in which that should have been done and this witness's evidence does not carry the case for the appellant very far.

Raj Kumar having been informed by his sister of what had occurred, obtained a copy of the deed, which he says he procured on the 22nd or 23rd January, 1916. On the 26th January he borrowed a sum of Rs. 2000 from the appellant the significance of which will have to be considered in dealing with his connection with this affair. On the 31st January, the respondent made an application to the Court of the Subordinate Judge for a succession certificate to enable her to realise a sum of Rs. 2825 for which her late husband had been insured in the Phoenix Insurance Company Ltd. On the 23rd February she filed a further petition asking that Government Promissory Notes of the total approximate value of Rs. 7,500 should be included in the application. Raj Kumar Deoti signed this application on behalf of the respondent. The need for

the application according to Raj Kumar was that his sister was going to bring a suit to set the deed aside which would cost a good deal of money, and in order to raise funds he made enquiries and from these made at the Bank, it came to his knowledge that the appellant had withdrawn Rs. 11,000 and was about to withdraw the Government Promissory Notes. From the Insurance Co., he learnt that a succession certificate would be necessary before the money could be paid. While this application was pending events took a singular turn, for Raj Kumar, who professes to have been interested in securing for his sister her just rights, entered into negotiations with the appellant for the preparation and execution by the respondent of a deed to supplement the partition deed by making provision as regards items of property not comprised in it; in particular the items which were the subject of the application for the succession certificate. Raj Kumar says he asked Satis to make a draft but at no time did he consult his sister in the matter. The appellant's evidence as to this is that Raj Kumar asked him whether a supplemental deed should be executed with regard to the Government Promissory Notes and the life policy which had been omitted from the partition deed. A draft was accordingly prepared and made over to Raj Kumar. Then, according to the appellant, Raj Kumar told him that if he would discharge him from a debt of Rs. 35,00 which Raj Kumar owed him he would allow the respondent to execute it, otherwise he would prevent her from so doing. This statement, considered in the light of all the evidence, has the ring of truth about it. But as will be seen when I discuss Raj Kumar's position in relation to his sister and the deed in suit, so far from helping the appellant it militates against his success. Our attention has been drawn at some length to the details of the supplemental deed and errors in and omissions from the original deed which an examination of the supplemental deed discloses. For instance the valuation of the hardware business in Calcutta is given in the deed of the 4th November as Rs. 31,000 while from the supplemental deed the net value appears to be 56,851 rupees. It is admitted by the supplemental deed that mistakes have been made in incorporating certain matters in the deed of the 4th November; and in his evidence the appellant admitted the incorrectness of the valuation of the properties mentioned in the first deed. The supplemental deed was never executed. On the 8th April 1916 the appellant objected to the respondent obtaining a succession certificate and himself filed a petition to the Subordinate Judge for a succession certificate in respect of the Government Promissory Notes. In that petition

CIVIL.

1921.

Satis

v.

Kalidasi.

Buckland, J.

CIVIL.

1921.

Satis

Kalidasi.

Buckland, J.

he stated that he was the reversionary heir and claimed the sums in question as such, making no mention either of the partition deed or of the agreement only recently entered into for a supplemental deed. On the 16th May, the appellant filed a suit against Raj Kumar Deoti to recover Rs. 36,68-4-0 borrowed by him which sum included the Rs. 2,000 borrowed on the 26th January 1916. On the 18th of May according to the appellant's deposition in the proceedings for a succession certificate the respondent executed the am-mukhtearnama in favour of Raj Kumar. On the 20th May the applications for succession certificates were disposed of and the Court ordered that a succession certificate should issue to the appellant as regards the Government Promissory Notes and as regards the insurance money to the widow. On the 28th June of the same year the suit which has resulted in this appeal was filed. This is the case which the Subordinate Judge has considered and which he says is a fraud on the respondent.

The rules laid down by a long series of decisions for the protection of *purdanashin* ladies are well-established and it is unnecessary that I should repeat them. It is with their application that we are concerned and we have to consider whether or not those rules were observed in the circumstances in which the deed in question was executed. In my opinion, they were not. I have already indicated what the course of events suggests to my mind with reference to the will. That the appellant was aware of the contents of the proposed will I have no doubt, nor that his disappointment that it had not been executed was intense. But there was no need for the execution of a deed such as this immediately after the death of the husband of the respondent. There was no dispute and no "family arrangement" was necessary. But immediately her husband had died the respondent was importuned by the appellant and his adherents to execute this deed. That he saw his opportunity when she wanted a considerable sum to be spent in feeding the poor I feel convinced. The business which was the source of her income was in his hands. The *sradh* ceremony had to be performed. Whatever her rights may have been money had to be forthcoming at once for the purpose. Accordingly she agreed to the proposal, thinking that she was but giving effect to her husband's wishes. That she was doing so is extremely doubtful, either on the view taken by the Subordinate Judge as to the draft will, or in the view to which I inclined. But in any event she was entitled to be held by the appellant at arm's length and to receive independent advice and this is the point upon our view as



to which the decision of the appeal must depend. There is nothing to show that the respondent ever had independent advice. That a purdanashin lady must have independent legal advice is not necessary as an inflexible rule. But what I conceive to be the effect of the decisions is that, excluding those rare cases where the experience and attainments of the lady or the circumstances of the case render advice superfluous, a pardanashin lady must have advice, that the advisor should have no adverse interest, and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary contrasting them with her rights should the intended document not be executed by her: if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential. Considerable argument has been addressed to us on behalf of both parties as to the need for independent legal advice in this case. I am not prepared to say that it was not necessary. But inasmuch as I am of opinion that the lady had no independent advice at all, it is unnecessary to consider that aspect of the matter. All that has been proved assuming the evidence to be true, is that the document was read to her for I cannot give any weight to bald assertions that the document was explained without details of what such explanation consisted of. It has not been proved that she was aware what her rights were apart from the document, or that she was giving up any rights for what she obtained. It has been argued by the learned Advocate-General that she knew her rights, and that the discussions with her prior to the execution of the draft establish this. But this I do not think is the case. She was undoubtedly aware that the source of her income was the hardware business in Calcutta, but it has not been established that she knew what her rights were as a Hindu widow either with reference to the business or with reference to the immovables; or that she knew what she was giving up or what she was to obtain in return or the legal consequences of what she was doing. Yet these were matters of which she was entitled to be and ought to have been made fully cognisant. Who would naturally have been the people to explain matters to the respondent? The document which she was executing was for the benefit of her husband's brother. Ordinarily he would be the person whose duty it would be to protect her interests. In the circumstances she would turn to her own nearest male relatives. These are Kamini and Raj Kumar. But Kamini hardly comes into the case. It has not been suggested that he took the slightest interest

CIVIL

1921

Satis

Kalidasi

Buckland, J.

CIVIL.

1921.

Satis

Kalidasi.

Buckland, J.

in his sister's affairs and he may be ignored. What was Raj Kumar's position in the matter? He says that he heard about the deed from his sister. He obtained a copy of it from the registration office. He says that he brought it and told her that she had been defrauded. Taking those statements as an index to his state of mind in January, how is it to be explained that in March he was entering into negotiations with the appellant for the execution by the respondent of a supplemental deed with reference to which he never consulted his sister at any time? He was a man who, it must be borne in mind, was in debt to the appellant. It would have been a matter for surprise had he advised his sister to execute the supplemental deed. At the same time as he was thus negotiating he was lending his sister his support in her application for a succession certificate. His attitude with regard to the supplemental deed and the succession certificate cannot be reconciled with his conduct with reference to the deed as soon as he had obtained a copy of it. In May the appellant filed a suit against Raj Kumar who responded by obtaining an ammuktearnama from his sister for the purpose of filing this suit. From that time onwards Raj Kumar sided with the respondent. It is quite impossible to regard Raj Kumar as a disinterested person. So far from being disinterested, I think that it is abundantly clear that throughout the whole period till the 18th May he was actuated solely by self-interest. Raj Kumar is stated by the appellant and his witness to have been present on the various occasions when the matter was discussed with the respondent. In the view that I take of Raj Kumar's connection with and attitude towards this matter, it is quite possible that he was there. But that he was advising his sister and acting in her interests, I do not think is in the least degree probable. So far from that being the case I think that the inference which may very fairly be drawn from the facts and circumstances is that he was furthering the interests of the appellant for his own advantage in the first instance and that he eventually sided with his sister when the institution of the suit for Rs. 3,668-4 showed him that the appellant was not prepared to treat him favourably. It is impossible, on a view of the evidence most favourable to the appellant, to take the view that Raj Kumar Deoti is a person who can be regarded as an independent adviser of the respondent.

I concur in the order to be made.

A. T. M.

*Appeal dismissed.*

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.*

NIBARAN CHANDRA MOOKERJEE AND ANOTHER

v.

NIRUPAMA DEBI AND ANOTHER.\*

CIVIL.

1921.

June, 13, 14, 16, 17,  
August, 18.

*Pardanashin lady—Deed, execution of—Evidence Act (I of 1872), Sec. 110—Good faith—Burden of proof—Person deriving benefit under a deed—Independent and competent advice—Joint property—Nucleus—Separate estate—Limitation Act (IX of 1908), Sch. I Art. 91—Account.*

The Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. These principles fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically: *Mariam v. Ibrahim* (1). The fairness of the bargain is the crucial test.

The Court should have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself: *Sunatibala v. Diara Sundari* (2) and other cases.

There is a grave risk of failure of justice, if these general principles are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction: *In Re Coomber* (3).

\*Appeal from Original Decree No. 126 of 1920, against the decree of Babu Lal Behary Chatterjee, Subordinate Judge of Hooghly, dated the 14th April, 1920.

(1) (1916) 28 C. L. J. 306 (367).

(2) (1919) L. R. 46 I. A. 272; I. L. R. 47 Calc. 175.

(3) (1911) 1 Ch. 723 (730).

CIVIL.

1921.

Nirupama

v.

Nirupama.

Where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of any thing approaching to imposition, overreaching, undue influence, or unconscionable advantage.

There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original rights; for equity demands in such circumstances the most abundant good faith in the transaction between the parties.

Where the family was joint and there was a nucleus of joint property, the burden lies on the party setting up a case of separate estate: *Anand Rao v. Vasant Rao* (1).

Article 91 of schedule I of the Limitation Act has no application to a case where a suit is brought for possession and partition upon declaration that an instrument under which the defendant claims is void: *Banku v. Krishno* (2) and other cases.

The burden lies upon the defendant who obtained the deed by misrepresentation, to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit: *Rahimboy v. Turner* (3).

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *karta* is liable is as to the existing state of the property divisible; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the *karta* is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the *karta* says it is.

Appeal by the Defendants.

Suit for partition of the joint family properties, for accounts, and for incidental reliefs.

The material facts appear from the judgment.

*Dr. Dwarka Nath Mitter* and *Babu Hira Lal Sanyal* for the Appellants.

*Babu Pyari Mohon Chatterjee* for the Respondents.

C. A. V.

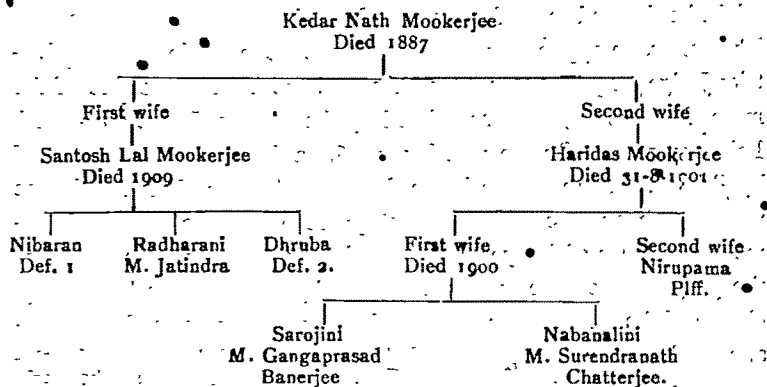
(1) (1907) 5 C. L. J. 338; 11 C. W. N. 478; 9 Bom. L. R. 595.

(2) (1902) 1 L. R. 30 Cal. 433.

(3) (1892) 1 L. R. 17 Bom. 341; L. R. 20 I. A. 1.

The judgment of the Court was delivered by

**Mookerjee J.**—The subject matter of the litigation which has culminated in this appeal is the estate left by one Haridas Mookerjee who died on the 31st. August, 1901. The relationship of the members of the family to which he belonged may be gathered from the following pedigree :



Kedar Nath Mookerjee, the founder of the family, left two sons by two wives, namely, Santosh Lal Mookerjee and Haridas Mookerjee. Santosh Lal Mookerjee left two sons Nibaran Chandra Mookerjee, and Dhruvapada Mookerjee, who are the defendants in this suit. Haridas Mookerjee left a widow Nirupama who is the plaintiff in this litigation, and two daughters Sarojini and Nabanalini by a predeceased wife, a cousin of Nirupama. At the time of the death of Haridas Mookerjee, his second wife Nirupama had not yet attained majority. On the 5th May, 1905, Tripura Charan Chatterjee, her father, made an application to the District Judge under the Guardian and Wards Act, 1890, to have himself appointed as guardian of the person and properties of the minor. The order was made in due course on the 26th May, 1905. The correspondence, which took place at that time between Tripura Charan Chatterjee and Santosh Lal Mookerjee and has been produced in this case, leaves no room for doubt that the application was encouraged by the brother-in-law of the lady who was also the immediate reversionary heir to the estate of her husband. The reason why he keenly interested himself in the matter of the guardianship application becomes manifest when we examine the events subsequent. On the 21st September, 1905, the guardian applied to the District Judge for permission to lease out the property of his ward to the reversioner Santosh Lal Mookerjee. The District Judge asked for specific information as to the terms,

CIVIL.

1921.

Nibaran

Nirupama.

August, 1905.

CIVIL.

1921.

Nibaran

v.

Nirupama.

Mookerjee, J.

the period of the proposed lease and the annual rent reserved thereunder. The information was not supplied and the petition was dismissed on the 7th November 1905. On the 15th November, 1905, the District Judge recorded an order that as no property was to be leased out for more than five years, his sanction was not necessary, and the guardian was at liberty to make such arrangements for the maintenance of the minor and the management of her property as might be deemed to be for the benefit of the minor and her estate. Thereafter, an application appears to have been made to the District Judge for permission to make a settlement of the estate of the minor for her life; this was refused by the District Judge on the 8th February 1906. On the 1st May, 1906, a document was executed by Tripura Charan Chatterjee in favour of Santosh Lal Mookerjee which has been described in these proceedings as a deed of settlement for a term of five years. The effect of this deed was to place the properties of the minor inherited by her from her husband in charge of the reversioner, who undertook to pay her a fixed allowance and to bear the expenses of the marriage of her second step-daughter. The deed was to continue in operation from 17th November, 1905 to the 16th November, 1910. On the expiry of the term of this deed, the parties apparently reverted to the previous state of things which continued for more than two years. On the 22nd June, 1913, Nirupama, who had meanwhile attained her majority, executed a deed in favour of Nibaran Chandra Mookerjee and Dhruvapada Mookerjee who had succeeded to the interest of their late father Santosh Lal Mookerjee in the family estate. This deed, which is described as a deed of settlement, was closely modelled on the deed of the 1st May 1906 with two fundamental differences, namely, first, that the settlement was not for a term of five years but for the life of the lady, and, secondly, there was no provision for the marriage expenses of the step-daughter whose marriage had already taken place in the interval. On the 20th June, 1918, Nirupama instituted the present suit for partition of the joint family properties, for accounts, and for incidental reliefs, on declaration that the deed of the 22nd June, 1913, was void and inoperative in law and had in no way affected her interest in the family estate as heir-at-law to her husband. The defendants repudiated the claim substantially on the ground that the plaintiff was bound by her deed and could not claim joint possession or partition of what had in essence ceased to be joint family estate. On these pleadings, twelve issues were raised by the trial Court; of these, reference need be made only to four;

- (1) Is the suit barred by limitation?
- (2) Are the properties in suit the joint family properties of the parties or are any of these the self-acquired properties of the defendants and their father?
- (3) Is the settlement deed of the 22nd June, 1913, tainted with fraud and undue influence?
- (4) Are the defendants liable to render accounts to the plaintiff? If so, for what and up to what period?

The Subordinate Judge has held on the evidence that the deed was obtained from the plaintiff under circumstances which did not make it binding upon her as a *pardanashin* lady, and that in fact she was not aware of the contents of the document which she believed was a deed for five years, similar to the deed which had been previously executed by her father. The Subordinate Judge has also found that the properties in suit were joint properties of the two sons of Keder Nath Mookerjee or were accretions thereto made by the use of the joint family funds. The Subordinate Judge has further held that the defendants were bound to render accounts of the cloth and grocery shops which belonged to the family, such accounts to be rendered from the date of death of their father till the dates when the shops were closed. In this view, the Subordinate Judge has decreed the suit and directed the appointment of a commissioner to make the partition and to take the accounts. On the present appeal, this decree has been assailed by the defendants on the grounds, that the deed was fairly taken from the plaintiff and was binding upon her, that the deed could not be set aside after the lapse of the period of limitation prescribed for the institution of a suit for that purpose, that the effect of the deeds of the 1st May, 1906 and 22nd June, 1913, was to cause a disruption of the joint family, so that the properties acquired after the date of the first deed could not be deemed to possess the character of joint family properties, and, finally, that the defendants were not liable to render accounts.

The substantial point in controversy is, whether the deed of the 22nd June, 1913, is a fair transaction which binds the plaintiff as a *pardanashin* lady. Before we investigate the attendant circumstances, we may conveniently recall the cardinal tests which must be applied to determine the operative character of deeds taken from *pardanashin* ladies who are unable to protect themselves. It is well settled that the Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some

CIVIL.

1921.

Nibarani

Nirupama.

Mookerjee, J.

CIVIL.

1921.

Nibaran

Nirupama.

Mookerjee, v

person duly authorised by her, with a full understanding of what she was about to do ; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered ; and thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgments of this Court in *Mariam Bibee v. Ibrahim* (1) ; *Krishna Kisor De v. Nagendrabala Chaudhuri* (2), and *Satis Chandra Ghosh v. Kamdasi Dasi* (3) (A. O. D. 195 of 1919 decided by Mookerjee and Buckland JJ. on the 15th July, 1921). On examination, these decisions will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence ; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted ; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the confusion which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions in *Ranee Usmut Koonwar v. Tayler* (4) ; *Tayler v. Ranee Asmedh Koonwar* (5) ; *Sooniar Koomaree v. Kisho ee Lal* (6) ; *Ram Pershad v. Ranee Phoolputtee* (7) ; *Kanai Lal v. Kamini* (8) ; *Manohar v. Bhagabati* (9) ; *Amutoonissa v. Alla Hafiz* (10) ; *Roop Narain v. Gugadhur* (11) ; *Panna Lal v. Bama-sundari* (12) ; *Doolee Chand v. Oomda Khanum* (13) ; *Bibee Rukhun v. Shaikh Ahmed* (14) ; *Khas Mehal v. Administrator-General* (15) ; *Nistarini v. Nundo Lal* (16) ; *Keshub v. Rudha Raman* (17) ;

(1) (1916) 28 C. L. J. 306 (367).

(2) (1921) 34 C. L. J. 333 ; 25 C. W. N. 942.

(3) (1921) Since reported : 34 C. L. J. 529.

(4) (1865) 2 W. R. 307.

(5) (1865) 4 W. R. 86.

(6) (1866) 5 W. R. 246.

(7) (1867) 7 W. R. 98.

(8) (1867) 1 B. L. R. O. C. J. 31 foot-note.

(9) (1867) 1 B. L. R. O. C. J. 28.

(10) (1867) 8 W. R. 468.

(11) (1868) 9 W. R. 217.

(12) (1871) 6 B. L. R. 732 (741).

(13) (1872) 18 W. R. 238.

(14) (1874) 22 W. R. 443.

(15) (1901) 5 C. W. N. 505.

(16) (1899) 1 L. R. 26 Cal. 891 (918).

(17) (1912) 17 C. W. N. 991.



*Kamini v. Krishna Chandra* (1); *Badiatannessa v. Ambika Charan* (2); *Bhuban Mohini v. Gajalakshmi* (3); *Behari v. Habiba* (4); *Achhan Kuar v. Thakur Das* (5); *Hakim v. Najiban* (6); *Sum-suddin v. Abdul* (7); *Tamarasherri v. Maranat* (8); *Mahadevi v. Neelamani* (9); *Latcheny v. Lewcock* (10); *Chellummal v. Garrow* (11); *Narsummiall v. Lutchmana* (12). Reference may also be made in this connection to the two decisions of the Judicial Committee in *Buzloor Ruheem v. Shumsoonnissa* (13); and *Geresh v. Bhuggootty* (14). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from purdah women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist: *Fussal v. Amjud* (15); *Ashgar v. Delroos* (16); on appeal from *Dalroos v. Ashgur* (17); *Azeesoonnissa v. Baqur Khan* (18); *Tawordeen v. Syed Ali* (19); *Sudhist Lal v. Sheobarat* (20); *Mahomed Buksh v. Hosseini* (21); *Lala Amarnath v.*

CIVIL

1921.

NIBARAN

v.

NIRUPAMA.

Mookerjee, J.

(1) (1912) I. L. R. 39 Calc. 933.

(2) (1914) 18 C. W. N. 1133. (3) (1915) 19 C. W. N. 1330.

(4) (1886) I. L. R. 8 All. 267.

(5) (1895) I. L. R. 17 All. 125.

(6) (1898) I. L. R. 20 All. 447.

(7) (1906) I. L. R. 31 Bom. 165.

(8) (1881) I. L. R. 3 Mad. 215.

(9) (1896) I. L. R. 20 Mad. 269 (273.)

(10) (1800) 1 Strange N. C. 30. (11) (1812) 2 Strange N. C. 159.

(12) (1805) 2 Strange N. C. 14.

(13) (1867) 11 M. I. A. 551 (585); 8 W. R. P. C. 3 (5).

(14) (1870) 13 M. I. A. 419 (431); 14 W. R. P. C. 7 (10).

(15) (1872) 17 W. R. 523.

(16) (1877) I. L. R. 3 Calc. 324.

(17) (1875) 15 B. L. R. 167. (18) (1872) 10 B. L. R. 205.

(19) (1874) L. R. 1 I. A. 192; 13 B. L. R. 427.

(20) (1881) L. R. 8 I. A. 39; I. L. R. 7 Calc. 245.

(21) (1888) L. R. 15 I. A. 81; I. L. R. 15 Calc. 684.

CIVIL.

1921.

Niharan

v.

Nirupama.

Mookerjee, J.

*Achan Kuar* (1); *Deo Kuar v. Man Kuar* (2); *Hakim v. Najban* (3); *Annoda v. Bhuban* (4); *Shambati v. Jago* (5); *Ismail v. Hafiz* (6); *Kishori Lal v. Chuni Lal* (7); *Muhammad Kamil v. Imtiaz Fatima* (8); *Sajjad y. Wasir* (9); *Kali Buksh v. Ram Gopal* (10); *Mahabir Prasad v. Taj Begam* (11); *Asima Bibi v. Shamalanand* (12); *Mohammad Ali v. Ramzan Ali* (13); *Sunitibala v. Dhara Sundari* (14) and *Mati Lal Das v. Eastern Mortgage & Agency Co.* (15). The essence of the matter was tersely put by Lord Buckmaster in *Sunitibala v. Dhara Sundari* (14) when he stated that the circumstances under which a *pardanashin* woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. The principle thus enunciated was adopted as the basis of the judgment pronounced by Sir John Edge in *Mati Lal v. Eastern Mortgage Co.* (15). It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself; *Sunitibala v. Dhara Sundari* (14); *Mati Lal Das v. Eastern Mortgage & Agency Co.* (15); *Mohammad Ali v. Ramzan Ali* (13); *Kali Buksh v. Ram Gopal* (10); *Sajjat Hussain v. Wasir Ali* (9); *Mahomed Buksh v. Hosseini* (16);

(1) (1892) L. R. 19 I. A. 196; I. L. R. 14 All. 420.

(2) (1894) L. R. 21 I. A. 148; I. L. R. 17 All. 1.

(3) (1898) L. R. 25 I. A. 137; I. L. R. 20 All. 447.

(4) (1901) L. R. 28 I. A. 71; I. L. R. 28 Calc. 546.

(5) (1902) L. R. 29 I. A. 127; I. L. R. 29 Calc. 242.

(6) (1906) L. R. 33 I. A. 86; I. L. R. 33 Calc. 773; 3 C. L. J. 484.

(7) (1908) L. R. 36 I. A. 9; I. L. R. 31 All. 116; 9 C. L. J. 172.

(8) (1908-9) L. R. 36 I. A. 210; I. L. R. 31 All. 557; 10 C. L. J. 297.

(9) (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613.

(10) (1913) L. R. 41 I. A. 23; I. L. R. 36 All. 81; 19 C. L. J. 172.

(11) (1914) 19 C. W. N. 162 P. C.

(12) (1912) I. L. R. 40 Calc 378 P. C.; 17 C. L. J. 303.

(13) (1920) 24 C. W. N. 977 P. C.

(14) (1919) L. R. 46 I. A. 272; I. L. R. 47 Calc 175.

(15) (1920) L. R. 47 I. A. 265; 25 C. W. N. 265.

(16) (1888) L. R. 15 I. A. 81; I. L. R. 15 Calc. 684.

*Mahabir Prasad v. Taj Begam* (1); *Azima Bibi v. Shamalanand* (2); *Ismail v. Hafs* (3); *Hodges v. Delhi and London Bank* (4); *Bindubasini v. Giridhari* (5); *Alikjan v. Rambaran* (6); *Bhuban Mohini v. Gajalakshmi* (7). These, however, are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

The case before us belongs to the first class mentioned above, where the persons who seek to hold the lady to the terms of her deed stand towards her in a relation of personal confidence. Santosh Lal Mookerjee, who had taken the first deed from her father, was the elder brother of her husband and the head of the joint family at the time. Nibaran Chandra Mookerjee and Dhrubapada Mookerjee who took the second deed from her were the sons of the step-brother of her husband, and the management of the family estate would devolve on them after the death of her brother-in-law; she was on the best of terms with them, and would, according to the normal structure of a joint Hindu family, look upon them as her natural protectors in whom she might repose confidence properly to safeguard her rights. In such circumstances, the elementary principle formulated in section 111 of the Indian Evidence Act would become applicable, namely, that where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. Whenever a person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching imposition, overreaching, undue influence, or unconscionable advantage. In the case before us, there is the significant fact that the executant of the deed was a lady of weak intellect, the daughter of an insane mother, and at the time of

CIVIL.

1921.

Nibaran

v.

Nirupama.

Mookerjee, J.

(1) (1914) 19 C. W. N. 162.

(2) (1912) I. L. R. 40 Calc. 378; 17 C. L. J. 303.

(3) (1906) L. R. 33 I. A. 86; I. L. R. 33 Calc. 773; 3 C. L. J. 484.

(4) (1900) L. R. 27 I. A. 168; I. L. R. 23 All. 137.

(5) (1909) 12 C. L. J. 115.

(6) (1910) 12 C. L. J. 357.

(7) (1915) 19 C. W. N. 1330.

CIVIL.

1921.

Nibaran.

Nirupama.

Mookerjee, J.

the transaction was an illiterate girl-widow who had just come of age. In such circumstances, it would be the imperative duty of those who took the deed from her to keep her at arm's length and to take every possible precaution to make sure that she received independent advice, understood the relevant and important matters, and appreciated the true effect of the deed on her rights, and further that nothing was concealed from her, nothing was misrepresented to her, no undue influence was exerted on her. The defendants asserted that these conditions were substantially fulfilled, because the lady herself offered to execute a deed of settlement for life, and acted under the advice and guidance of her father. The lady, on the other hand, maintained that she understood that the deed was to be operative for five years only, like the deed previously executed by her father. The Subordinate Judge has accepted her version, and we see no reason to differ from his view on this point. The testimony of Jotindra Nath Benerjee, Nirmal Chandra Benerjee and Nibaran Chandra Mookerjee makes it abundantly clear that Tripura Charan Chatterjee, the father of the lady, obtained the signature of her daughter to the deed, but the document was not explained to her nor was she advised as to the effect of the disposition on her interest. The father was plainly not in a position to give independent advice to her daughter. He held an appointment at Krishnagar; his widowed daughter resided in the interior of the district of Hughli; thus his own avocations made it impossible for him to look after the estate of his daughter. He had, besides, through the good offices of Santosh Lal Mookerjee, acquired some properties at Hanral, the ancestral place of residence of the family of his deceased son-in-law. For the management of these properties, he had to rely in a large measure upon Santosh Lal Mookerjee and and his sons, the present defendants. He was thus under considerable obligation to them and could not afford, in his own interest, to lose their co-operation, much less to incur their displeasure. That he was in a situation of embarrassment is plainly indicated by the correspondence which passed between himself and the defendants, who were by no means punctual in the discharge of their pecuniary obligations and preferred to retain in their hands, as long as they could, notwithstanding the insistent demands of Tripura Charan Chatterjee, money payable to him or to his daughter. We are of opinion that surrounding circumstances unmistakably point to the conclusion that Tripura Charan Chatterjee was by no means free to act solely in the interest of his daughter, and the fact cannot be ignored that even after disputes had arisen and this litigation had

commenced, he and his son have been on friendly terms with the defendants. We cannot further overlook that, shortly after the death of his son-in-law, he had applied to be appointed guardian of the person and property of his daughter, not so much for her benefit as for the advantage of Santosh Lal Mookerjee who was anxious to have control over the share of his stepbrother in the family estate. There is no room for doubt that the proceedings in Court on that occasion were engineered by Santosh Lal Mookerjee. If then we consider the conduct of Tripura Charan Chatterjee in connection with the guardianship proceedings, and the execution of the two deeds of settlement, there can be little doubt that his acts have not been guided solely by an anxious desire to protect the interest of his widowed daughter. In our opinion, the Subordinate Judge has correctly held that the lady had not independent advice, as the interest of her father was bound up with that of the defendants.

There is no room for controversy that this absence of independent advice has been detrimental to the interests of the plaintiff. When the second deed of settlement was executed, its provisions and their true effect were not explained to her. What is of equal importance is that she was not apprised of the extent, value, and income of all the joint properties. Neither the deed of the 1st May, 1906 nor the deed of the 22nd June, 1913 correctly enumerated and valued all the joint properties, movable and immovable. This, indeed, is not a matter for surprise, because the defendants have strenuously maintained that, if not all the properties acquired after the death of their uncle, at least those acquired after the execution of the first deed, did not form part of the joint estate. We hold accordingly that the disputed deed of settlement was understood by the lady to be a deed for five years whereas in reality it was a deed operative for her life; that she had no independent advice; that the extent, income and value of all the joint properties, movable and immovable, were not disclosed to her, and that the effect of the deed on her rights was never brought home to her. It is consequently impossible to say that she had independent and competent advice, which, as observed by Fletcher Moulton L. J. in *In re Coomber* (1) no doubt does not mean independent and competent approval, but signifies, at any rate, advice removed entirely from the suspected atmosphere and conveyed in the clear language of an independent mind, free from taint of interests, to the party acting, regarding the precise nature and consequences of the transaction. In cases of this class, there need not

CIVIL.

1921.

Niraran

Nirupama.

Mookerjee, J.

(1) (1911) 1 Ch. 723 (730).

CIVIL.

1921.

Nibaran

v.

Nirupama.

Mookerjee, J.

necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, the Court will interpose and pronounce the transaction void, and will, as far as possible, restore the parties to their original rights, because equity demands in such circumstances the most abundant good faith in the transaction between the parties. We affirm without hesitation the conclusion of the Subordinate Judge that the disputed deed of settlement does not bind the plaintiff. Clearly no question of estoppel, acquiescence and waiver arises. The plaintiff no doubt received from time to time maintenance allowance from the defendants. Such allowance however would be payable whether the deed was for five years as the plaintiff supposed it to be, or for life as in fact it was. There is no indication that the plaintiff ever accepted these sums with knowledge that the terms of the deed were in reality different from what she understood them to be.

We have next to consider whether all the properties in suit are joint properties. The Subordinate Judge has answered this question in favour of the plaintiff. The properties which were inherited by Santosh Lal Mookerjee and Hari Das Mookerjee, the two sons of Kedar Nath Mookerjee, were indisputably joint. There is also no doubt that the two brothers lived as members of a joint Hindu family; the elder was manager of the zemindars at Bhastara and Naib of the Srimanis at Mandalghat; the younger lived at home, worked as gomasta in a neighbouring village and looked after the joint family business in grocery, cloth, iron, ploughs, spades, oilcake money-lending and sale of stamps. The properties acquired during this time were *prima facie* joint properties of the two brothers. The burden in such circumstances lies on the party setting up a case of separate estate to establish his allegation, as the family was joint and there was a nucleus of joint property; see the judgment of Lord Robertson in *Anandrao v. Vasantrao* (1), affirming the decision of Jenkins C. J. in *Wasantrao v. Anandrao* (2). This also accords with the view indicated by Couch C. J. in *Taruck Chunder v. Joodheshteer* (3), which was followed in *Gobind v. Doorgapersad* (4) and *Shushee Mohun v. Aukhil* (5), although the

(1) (1907) 5 C. L. J. 338; 11 C. W. N. 478; 9 Bom. L. R. 595.

(2) (1904) 6 Bom. L. R. 925.

(3) (1873) 19 W. R. 178.

(4) (1874) 14-B. L. R. 337; 22 W. R. 248.

(5) (1876) 25 W. R. 232.

contrary opinion had been expressed in *Bholanath v. Ajoodia* (1), and *Deionath v. Hurrinarain* (2): see also *Bodh Sing v. Gunesh Chunder* (3); *Atar Singh v. Thakar Singh* (4) and *Rama Nath v. Kusum Kamini* (5). The defendants endeavoured to rebut this presumption by proof that some of the properties were acquired by Santosh, and others by Nibaran and Dhruba from their separate funds. Evidence was led by the defendants to show that they and their father had separate debtors and that the properties were purchased in satisfaction of the debts due from such debtors as also from the sale proceeds of the paddy realised from them. This theory of separate debtors and separate accounts, however, completely broke down, when it transpired that the accounts of the money-lending business were mixed up with the accounts of the undoubtedly joint cloth and grocery shops. The Subordinate Judge has carefully scrutinised the account books, and has correctly summed up his conclusion in the finding that the story of separate money-lending business is a myth. It is, we think, fairly clear from the evidence that Santosh and Haridas had a joint money-lending business, though some of the transactions stood in the name of the former and others were in the name of the latter; after the death of Haridas, the business was managed by Santosh and the present defendants. The acquisitions made from this source were obviously impressed with the character of joint family properties. It was ingeniously argued, however, by Dr. Dwarkanath Mitter that the first deed of settlement effected a disruption of the joint family and that whatever properties were acquired thereafter belonged to the elder branch of the family represented by Santosh Kumar Mookerjee. This contention is fallacious; for the deed of settlement was in essence a deed of management and did not cause a severance of the family; the title to the half share inherited by the plaintiff from her husband never vested in her brother-in-law. He became entitled only to hold possession for a term of five years and to apply the income in the prescribed manner. In such circumstances, the principle deducible from the decisions of the Judicial Committee in *Suraj Narain v. Ekbal* (6); *Girija Bai v. Sadasiv* (7), and *Kawal v. Prabhu Lal* (8);

(1) (1873) 12 B. L. R. 336; 20 W. R. 65.

(2) (1873) 12 B. L. R. 349.

(3) (1873) 12 B. L. R. 317 P. C.

(4) (1900) L. R. 35 I. A. 206; 1 L. R. 35 Calc. 1039; 8 C. L. J. 359.

(5) (1906) 4 C. L. J. 56.

(6) (1912) L. R. 40 I. A. 40; 1 L. R. 35 All. 80; 17 C. L. J. 288.

(7) (1916) L. R. 43 I. A. 151; 1 L. R. 43 Calc. 1031; 24 C. L. J. 207.

(8) (1917) L. R. 44 I. A. 159; 1 L. R. 39 All. 496.

CIVIL.

1921.

Nibaran

v.

Nirupama.

Mookerjee, ?.

## CIVIL.

1921.

Nibaran  
v.

Nirupama.

Hookerjee, J.

can be of no assistance to the defendants. We need not now examine whether the act of the guardian was really beneficial to his ward or whether it was so detrimental to her interests as to amount to a fraud on her: *Hunoomanpersaud v. Babooee* (1); *Lalla Bunseedhur v. Bindeseree* (2). This much is incontestable that what the grantee undertook to carry out in terms of the deed was the minimum he was under an obligation to perform as the head of the joint family, namely, to maintain the widow and to give in marriage the daughter of his deceased step-brother. The result of the transaction was to enable him to appropriate a considerable proportion of the income of the joint family properties, much in excess of what would be his legitimate share on partition. It would be contrary to elementary notions of justice, equity and good conscience to hold that by an appeal to any supposed principles of Hindu Jurisprudence the head of the family could, in such an event, treat the joint family as dissolved and the profits in his hands made available for his personal benefit, to be transformed into "self-acquisitions." We hold accordingly that the Subordinate Judge has correctly held that all the properties in suit, whether acquired during the lifetime of the two sons of the founder or of the defendants, are joint family properties and are liable to be partitioned as such.

On the facts found, no question of limitation obviously arises. If we adopt the view that the deed actually executed by the lady was so fundamentally different from the deed she intended to execute and thought she executed, it is void and inoperative. Article 91 of the schedule to the Indian Limitation Act has no application to a case of this description, where a suit is brought for possession and partition upon declaration that an instrument under which the defendant claims is void: *Banku Behari v. Krishto Gobindo* (3); *Sauni Bibi v. Siddik Hossein* (4); *Oriental Bank Corp. v. Fleming* (5); *Dagdu v. Bhana* (6). On the other hand, if we adopt the theory that the deed must be cancelled in a suit instituted within three years from the date when the facts entitling the plaintiff to have the instrument cancelled became known to her, the burden lies heavily upon the defendants, who obtained the deed by misrepresentation, to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow her to maintain the suit: *Rahimbhoy v. Turner* (7). This they have failed to

(1) (1856) 6 M. I. A. 393; 18 W. R. 81 footnote.

(2) (1866) 10 M. I. A. 454 (471).

(3) (1902) I. L. R. 30 Calc. 433.

(4) (1918) 29 C. L. J. 55; 23 C. W. N. 93.

(5) (1879) I. L. R. 3 Bom. 242.

(6) (1904) I. L. R. 28 Bom. 420.

(7) (1892) I. L. R. 17 Bom. 341 P. C.; L. R. 20 I. A. 11.



establish, and the allegation of the plaintiff as to the date when she discovered the fraud committed upon her, stands un rebutted.

Finally, objection has been taken to the direction given by the Subordinate Judge which calls upon the defendants to render accounts of the cloth and grocery shops from the death of their father till the shops were closed in 1912 and 1913 respectively. Reliance has been placed upon the decision of the Judicial Committee in *Soakhmoy v. Monohurri* (1), where Sir Richard Couch referred to the earlier decision of the Judicial Committee in *Soorjee-mony v. Denobundoo* (2), and observed as follows with reference to an order for adjustment of accounts made by the Courts in India : " It is not intended that the different payments by the manager, of moneys taken out by the members of the family, should be inquired into, but it is to ascertain what portion of the savings of the family, or the accumulations which have been made, the plaintiff would be entitled to." This is settled law, as is clear from the decisions in *Parmeshwar v. Gobind* (3); *Bhowani v. Juggernath* (4); *Haridas v. Narotam* (5); *Balakrishna v. Muthusami* (6); and as we read the judgment of the Subordinate Judge, he did not intend to depart from such a well-recognised principle. In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the Karta is liable for is as to the existing state of the property divisible; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the Karta is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the Karta says it is.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

*Appeal dismissed.*

(1) (1885) L. R. 12 I. A. 103; I. L. R. 11 Calc. 684.

(2) (1862) 9 M. I. A. 123.

(3) (1915) I. L. R. 43 Calc. 459.

(4) (1908) 9 C. L. J. 133.

(5) (1911) 14 Bom. L. R. 237.

(6) (1908) I. L. R. 32 Mad. 271.

Civil.

1921.

Nibaran

v.

Nirupama.

*Mookerjee, J.*

# CRIMINAL REVISION.

*Before Mr. Justice Newbould and Mr. Justice Ghose.*

JIARATDIN MOHAMMED AND OTHERS,

v.

KING-EMPEROR.\*

CRIMINAL.

1921.

September, 15.

*Order, legality of—Order under section 144 of the Code of Criminal Procedure (Act V of 1898)—Penal Code (Act XLV of 1860), Sec. 188.*

An application for revision against an order passed under section 144 of the Code of Criminal Procedure was rejected by the High Court on the ground that at the time it was made the period of the order had elapsed and it was stated when the order was passed that the question of the legality of the order could be raised at the trial of the petitioners should they be prosecuted under section 188 of the Indian Penal Code. The petitioners were prosecuted under section 188.

*Held*, that the legality of the order under section 144 of the Code of Criminal Procedure could be questioned in proceedings under section 188 of the Indian Penal Code.

Applications for Revision under section 435 of the Code of Criminal Procedure.

In Criminal Rule No. 514, the three petitioners were sentenced under section 188 Indian Penal Code to pay a fine of Rs. 10 each, in default, each to suffer simple imprisonment for a week each, and in Criminal Rule No. 515, the seven petitioners were sentenced under section 188 Indian Penal Code to pay a fine of Rs. 10 each, in default, to suffer simple imprisonment for a week each.

The material facts appear from the judgment.

*Babus Manimatha Nath Mukherjee* and *Pannalal Chatterjee* for the Petitioners in Rule No. 514.

*Babu Dasarathi Sanyal* for the Petitioners in Rule No. 515.

*No one* for the opposite Party.

The judgment of the Court was as follows :

These two Rules are directed against a conviction of the petitioners under section 188 Indian Penal Code. They were convicted on two trials ; but the appeals against the conviction were heard jointly by the learned District Magistrate of Dinajpore. The

\*Criminal Revision Nos. 514 and 515 of 1921, against the order of Nikhil Nath Roy, Esq, District Magistrate of Dinajpur, dated the 3rd May, 1921, affirming that of the Sub-Divisional Magistrate of Thakurgaon, dated the 11th January, 1921.

convictions were based on the disobedience of an order under section 144 Criminal Procedure Code which was passed by the Sub-divisional Magistrate of Thakurgaon forbidding the people in general especially the proprietor of Nitbazar, hat contiguous to Lahiri hat which was owned by a different proprietor to hold the Nitbazar hat on Mondays and Fridays. At the hearing of the appeals, it was urged that there was no necessity of an order under section 144 of the Code of Criminal Procedure. The question of the legality of the order does not appear to have been properly considered by the lower appellate Court. That Court appears to have held that the order must be held to have been legally passed because an application to the High Court against that order failed. But the application was rejected by this Court on the ground that at the time it was made the period of the order had elapsed and it was stated when the order was passed that the question of the legality of the order could be raised at the trial of the petitioners should they be prosecuted under section 188 Indian Penal Code. We, therefore, direct that the orders passed by the appellate Court in these two cases be set aside and the appeals be reheard. We think it desirable, as requested by the petitioners' vaki, that the appeals should be reheard, not by the District Magistrate but by the Sessions Judge; and we order accordingly.

A. T. M.

*Rules made absolute.*

## APPELLATE CIVIL

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice  
Panton.*

SUDHANYA SANTRA AND ANOTHER

v.

BASANTA KUMAR SARKAR AND ANOTHER.\*

*Appeal—Bengal Tenancy Act (VIII of 1885), Sec. 153—'Amount of rent annually payable'—Question as to entire rent or share of rent.*

An appeal lies to the District Judge against the decision of the judicial officer specially empowered by the Local Government to exercise final jurisdiction

\* Letters Patent Appeal No. 68 of 1920, against the decision of Mr. Justice Newbould, dated the 2nd August, 1920, in Appeal from Appellate Decree No. 2786 of 1919, confirming that of M. Smither Esq, District Judge of 24-Perganas, dated the 9th September, 1919, confirming that of Babu Aswini Kumar Das Gupta, Munsiff, 2nd Court, of Alipur, dated the 28th June, 1919.

CRIMINAL.

1921.]

Jiaratdin

v.

King-Emperor.

CIVIL.

1921.

August, 2.

CIVIL.

1921.

Sudhanya

Basanta.

under section 153 of the Bengal Tenancy Act, as to the question whether the plaintiff was entitled to the whole rent as claimed by him or only to a two-fifths share as asserted by the defendant. Such decision is a decision of the question of the amount of rent annually payable by the tenant; *Narain v. Manofi* (1) followed. *Baidya Nath v. Dhon Krishna* (2) and *Ram Mohan v. Badan* (3) distinguished.

Appeal by the Defendants.

Suit for recovery of arrears of rent.

The suit was decreed by the primary Court. The lower appellate Court dismissed the appeal on the ground that no appeal lay to it. On a second appeal this decree was confirmed by the following judgment of

1920.

August, 2.

**Newbould J.**—This appeal arises out of a rent suit which was heard by a Munsiff who was specially empowered under section 153 of the Bengal Tenancy Act. The plaintiffs claimed 16 annas rent from the defendants on the allegation that they had inherited a 6 annas and 8 gundas share in the maliki right from their mother and 9 annas and 12 gandas *ijara* right from their father. The contesting defendants admitted the plaintiff's maliki right to the extent of 6 annas and 8 gandas but denied the existence of any *ijara* right. The Munsiff found that the plaintiffs established their *ijara* right as well as the admitted maliki right and gave the plaintiffs a decree for the rent claimed. On appeal the learned District Judge held that no appeal lay, citing as an authority, the case of *Baidya Nath Bahara v. Dhon Krishna Sirkar* (2). Against this decision of the lower appellate Court this appeal has been preferred and the appellants have also obtained a Rule in case it should be held that no second appeal lay to this Court. As regards the question whether an appeal lay to the lower appellate Court, it is urged that the Munsiff's decision decided the question of the amount annually payable by the tenant. It is contended that the point is covered by the decision of the Full Bench in the case of *Narain Mahton v. Manofi Pattuk* (1). In that case the point actually decided by the Full Bench was in the following terms that the words "Amount of rent annually payable by a tenant" occurring in section 153 (a) of the Bengal Tenancy Act include the case of rent payable by a tenant to one of his co-sharer landlords who collects his share of the rent separately." It seems to me that the decision in that case cannot be made applicable to the facts of the present case. The plaintiffs were not, either on their pleadings

(1) (1890) I. L. R. 17 Calc. 489 F. B. (2) (1900) 5 C. W. N. 515.

(3) (1903) 2 C. W. N. 436.

or on the findings of the Court below, co-sharer landlords who were collecting their share of the rent separately. The issue on which the parties went on trial was framed in the following terms. 'Was there any *ijara* of a 9 as. 12 gds. share in favour of Ram Narain Sarkar and have the plaintiffs inherited the same? Are the defendants liable to pay 6 annas rent to the plaintiffs?' That is to say, the issue between the parties was not one as to the amount of rent but as to the plaintiff's title...and as the person whose title was set up was not a party to the suit, there could be no decision of a question of title as between parties having conflicting claims thereto. As, in the case relied on by the lower appellate Court, if the defendant was liable to pay the whole rent to the plaintiff, there was no dispute as to the amount of rent payable. The only issue in dispute was whether the relationship of landlord and tenant existed between the parties with regard to the entire holding and that was the only issue decided. The view I take that the Full Bench Reference above cited is not applicable to a case of this sort, was also taken by a single judge of this Court in the case of *Fakeer Mondul Gain v. Arshad Mollu* (1 of which a short note will be found in 10 C. W. N. 1, therefore, hold that the decision of the lower appellate Court that no appeal lay, was right and dismiss the appeal with costs. The Rule is discharged but without costs.

Against this decision, the Defendants appealed under clause 15 of the Letters Patent.

*Babus Nagendra Nath Ghose* and *Khitis Chandra Chakraborty* for the Appellants.

*Babu Monmohan Banerjee* for the Respondents.

The judgment of the Court was delivered by

**Mookerjee J.**—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for arrears of rent.

The suit was tried in the Court of first instance by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act and the amount claimed in the suit did not exceed Rs. 50. The suit was decreed with costs in favour of the plaintiff. Thereupon the defendant preferred an appeal to the District Judge; this was summarily dismissed under O. 41. R. 11. Civil Procedure Code on the ground that no appeal lay on the authority of the decision in *Baidya Nath v. Dhon Krishna* (2). A second appeal was thereupon preferred to

CIVIL.

1921.

Sudhanya

v.

Basanta.

Newbould, J.

August, 2.

(1) (1906) 10 C. W. N. cclXXX.

(2) (1900) 5 C. W. N. 515.

CIVIL.

1921.

Sudhanya

Basanta.

Mookerjee, J.

this Court. In support of the appeal it was argued before Mr. Justice Newbould that the appeal to the District Judge was competent inasmuch as the decree of the primary Court had decided a question of the amount annually payable by the tenant. This contention was overruled and the decree of the District Judge was affirmed. Consequently, the point involved in the present appeal is, whether the appeal to the District Judge was or was not competent under section 153 Bengal Tenancy Act. The determination of the question depends on the nature and contents of the decree made by the Court of first instance.

The suit was brought to recover arrears of rent at the rate of Rs. 8-3 as. 4 pies a year with cesses and damages for a period of four years. The case for the plaintiff was that in mouza Shaphkali he had inherited 6 as. 8 gundas share in maliki right from his mother Saroda Sundari Dasi and 9 as. 12 gandas share in ijara right from his father Ram Naran Sirkar. On this allegation the plaintiff sought to collect the sixteen annas rent from the tenant defendants who were in occupation of 3 bighas 16 Cotahs of land at a rental of Rs. 8-3-4 pies. The first defendant, who alone entered appearance, admitted that the plaintiff had maliki right to the extent of 6 as. 8 gandas share inherited from his mother but denied the existence of the alleged ijara right during the period in suit. Consequently, the point arose for decision, whether there was an ijara of 9 as. 12 gandas share in favour of Ram Naran Sarkar and whether the plaintiff had inherited that share; in other words, was the defendant liable to pay the sixteen annas share or only a 6 as. 8 gandas share of the rent to the plaintiff. The trial Court came to the conclusion that not only the maliki right but also the ijara right was in existence and that the plaintiff was consequently entitled to realise from the defendant the entire sixteen annas rent claimed. On these facts, the question arises whether the decree of the trial Court decided a question of the 'amount annually payable by the tenant. If the expression 'amount annually payable by the tenant' signifies the amount annually payable by the tenant in respect of the tenancy, there was no controversy between the parties and no decision on a disputed question, because they were agreed that the rent of the holding was Rs. 8-3 as. 4 gandas a year. On the other hand, if the expression 'amount annually payable by the tenant' signifies the amount annually payable by the tenant to the landlord who had instituted the suit for recovery of rent as stated in an earlier part of the sub-section, there was a substantial point in controversy namely, whether the amount payable by the defendant to the plaintiff was to

be calculated at the rate of Rs. 8-3-4 a year or at the rate of two-fifths of that sum.

The determination of this question at one time led to a divergence of judicial opinion in this Court as is clear from the decisions in *Prasanna Kumar Banerjee v. Srinath Dass* (1), and *Aubhoy Churn Maji v. Shoshi Bhusan Bose* (2). In the first case, Norris and Beverley JJ. held that when the question was whether the plaintiff was entitled to the whole sixteen annas of the rent or only to a ten annas share of it, no appeal lay, because there was no question of the amount of rent annually payable by a tenant, these words in the section meaning the total amount of rent annually payable in respect of a holding and not the amount of rent which may be payable to any particular co-sharer in the property. In the second case, where the tenant was sued for a rental of Rs. 15 but the defendant contended that this rental had been divided and that the plaintiff was entitled only to the rent of Rs. 7-8 as. which was half of the total amount of rent payable by the tenant, Mitter and Macpherson JJ. held that an appeal did lie as the decree of the lower Court had decided that the rent was Rs. 15 and not Rs. 7-8 which was in essence a decision on the question of the amount of rent annually payable by the tenant. These decisions were obviously in direct conflict with each other and led to a reference to a Full Bench in *Narain Mahton v. Manofi Pattuk* (3). In that case the plaintiff contended that he was entitled to an eight annas share of the rent of the disputed holding. The defendant contended that the plaintiff was entitled to eight pies share of the rent which was the extent of his share in the superior interest. It was ruled that an appeal lay against the decree which had decided whether the plaintiff was entitled to eight annas share or eight pies share of the rent. Mr. Justice Pigot who delivered the judgment of the Full Bench stated that the Full Bench agreed with the decision of Mitter and Macpherson JJ. in the case of *Aubhoy Churn Maji v. Shoshi Bhusan Bose* (2). Although in the judgment of the Full Bench, reference is not expressly made to the decision of Norris and Beverley JJ. in *Prasanna Kumar Banerjee v. Srinath Dass* (1) which we find was mentioned in the Order of Reference to the Full Bench, there can be no doubt that the decision in that case was overruled by the Full Bench.

In this view it is clear that in the present case, the decree of

CIVIL.

1921.

Sudhanya

v.

Basanta.

Mookerjee, J.

(1) (1887) I. L. R. 15 Calc. 231.

(2) (1888) I. L. R. 16 Calc. 155.

(3) (1890) I. L. R. 17 Calc. 489.

CIVIL.

1921.

Sudhanya

Basanta.

Mookerjee J.

the primary Court which had decided the question, whether the plaintiff was entitled to the whole rent as claimed by him or only to a two-fifths share as asserted by the defendant, was a decision of the question of the amount of rent annually payable by the tenant within the meaning of section 153 of the Bengal Tenancy Act and consequently the appeal to the District Judge was competent. This view is in accord with the decisions in *Poresk Moni v. Nobo Kishore* (1) and *Bashiram v. Srinath* (2); the decision of Beachcroft, J. in the case last mentioned was, we are informed, ultimately approved by Chitty and Walmsley, JJ. by the dismissal of an appeal preferred under the Letters Patent. It may be difficult to reconcile this view with the decision of Geidt, J. in *Fakeer Mondul v. Ashad Molla* (3), which, it should not be overlooked, was pronounced before the decision in *Poresk Moni v. Nobo Kishore* (1). On the other hand, the cases of *Baidya Nath v. Dhon Krishna* (4) and *Ram Mohan v. Badan Barai* (5), are distinguishable on the ground that in each of them the question in controversy was whether the relationship of landlord and tenant existed between the parties. In that class of cases, it has been uniformly held *Shalabati v. Rodrigues* (6), that the question whether the relationship of landlord and tenant does or does not subsist between the parties is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto within the meaning of section 153 of the Bengal Tenancy Act; nor can the decision of such a question be treated as a decision of the question of the amount of rent annually payable by the tenant, because no question of the amount annually payable by a tenant can obviously arise for consideration, till it has been ascertained that the relationship of landlord and tenant existed between the parties. It is only in the event of the establishment of such a relationship that a question may arise as to the amount of rent annually payable by the tenant to the landlord.

We are of opinion that this appeal must be allowed, the judgment of Mr. Justice Newbould set aside and the case remanded to the District Judge to be heard on the merits. The appellant is entitled to his costs both here and before Mr. Justice Newbould.

A. T. M.

*Appeal allowed.*

(1) (1903) 8 C. W. N. 193; I. L. R. 30 Calc. 773.

(2) (1919) 23 C. W. N. 76 S. N.

(3) (1906) 10 C. W. N. 280 S. N.

(4) (1890) 5 C. W. N. 515.

(5) (1903) 8 C. W. N. 436.

(6) (1908) I. L. R. 35 Calc. 547.



# INDEX OF CASES.

Vol. XXXIV.

—:0:—

|                                                                                          | PAGE.    |
|------------------------------------------------------------------------------------------|----------|
| Abatement—Appeal, imperfectly constituted—Appeal abated in part; <i>See</i>              |          |
| Partnership ... ..                                                                       | 405      |
| — of rent—Case before Bengal Tenancy Act came into force—No                              |          |
| agreement—Diluvion; <i>See</i> Burden of proof ... ..                                    | 35       |
| Accommodation, when ripens into easement—Part of tenement disposed,                      |          |
| affording accommodation to the part retained; <i>See</i> Easement ...                    | 518      |
| Account— <i>Karta</i> , liability of—Enquiry, nature of; <i>See</i> Pardanashin lady ... | 563      |
| —Manager of a joint family, liability of; <i>See</i> Partition ... ..                    | 56       |
| —Partner, without the consent of other partners, carrying on business                    |          |
| of the same nature as and competing with that of the firm; <i>See</i> Partner-           |          |
| ship ... ..                                                                              | 405      |
| —Trustee and <i>cestuis que trust</i> —Fiduciary relationships in India;                 |          |
| <i>See</i> Partition ... ..                                                              | 56       |
| —, if to be reopened—Account taken in the presence of the parties in-                    |          |
| terested and acquiesced in by them; <i>See</i> Partnership ... ..                        | 405      |
| —, mode of taking—Suit for recovery of money due on adjudication of                      |          |
| accounts upon dissolution of partnership business; <i>See</i> Partnership ...            | 405      |
| Acknowledgment of liability, if extends the period for execution of rent decree          |          |
| valued less than Rs 500—Limitation Act, Sec. 19; <i>See</i> Limitation ...               | 195      |
| Acquiescence—Burial of dead bodies—Desecration of graves; <i>See</i> Prescrip-           |          |
| tion ... ..                                                                              | 319      |
| Acquittal, effect of; <i>See</i> Will ... ..                                             | 373      |
| Act, previous history of, when can be resorted to—Uncertain or ambiguous;                |          |
| <i>See</i> Ejectment ... ..                                                              | 233      |
| — XI of 1859, Sec. 37 ... ..                                                             | 485      |
| — XLV of 1860, Sec. 188 ... ..                                                           | 578      |
| — XLV of 1860, Sec. 299, Explanation ... ..                                              | 515      |
| — XLV of 1860, Secs. 497, 498. ... ..                                                    | 51       |
| — VIII of 1870, Sec. 7 (X) (c) ... ..                                                    | 94       |
| — I of 1872, Secs. 47, 73 ... ..                                                         | 373      |
| — I of 1872, Secs. 66, 114 illus. (g), 164 ... ..                                        | 405      |
| — I of 1872, Secs. 68, 70 ... ..                                                         | 498      |
| — I of 1872, Sec. 83 ... ..                                                              | 205      |
| — I of 1872, Sec. 98 ... ..                                                              | 160      |
| — I of 1872, Sec. 134 ... ..                                                             | 107      |
| — I of 1872, Sec. 111 ... ..                                                             | 529, 563 |
| — I of 1877, Sec. 31 ... ..                                                              | 250      |
| — I of 1877, Secs. 54, 55 ... ..                                                         | 315      |

|                                                 | PAGE. |
|-------------------------------------------------|-------|
| Act XV of 1877, Sch. II. Arts. 140, 142, 144    | 129   |
| — V of 1881, Secs. 76, 82,                      | 457   |
| — IV of 1882, Sec. 52                           | 96    |
| — XIV of 1882, Sec. 211                         | 415   |
| — XIV of 1882, Sec. 443                         | 302   |
| — VI of 1885, Sec. 16                           | 119   |
| — VIII of 1885, Secs. 20, 21, 160 (d), 167      | 233   |
| — VIII of 1885, Secs. 61, 62                    | 501   |
| — VIII of 1885, Sec. 67                         | 369   |
| — VIII of 1885, Secs. 95 (a), 97                | 205   |
| — VIII of 1885, Sec. 103 B                      | 133   |
| — VIII of 1885, Sec. 103 B (3)                  | 504   |
| — VIII of 1885, Sec. 148 A Sch. III Art. 3      | 462   |
| — VIII of 1885, Sec. 153                        | 579   |
| — VIII of 1885, Secs. 184, 185, Sch. III Art. 6 | 195   |
| — VII of 1887, Sec. 8                           | 94    |
| — V of 1898, Secs. 110, 118                     | 53    |
| — V of 1898, Sec. 137                           | 172   |
| — V of 1898, Sec. 144                           | 578   |
| — V of 1898, Sec. 145                           | 127   |
| — V of 1898, Sec. 145 (4)                       | 125   |
| — V of 1898, Sec. 146                           | 302   |
| — V of 1898, Secs. 226, 227, 494                | 51    |
| — V of 1898, Sec. 531                           | 200   |
| — IX of 1899, Sec. 19                           | 173   |
| — V of 1908, Sec. 2 (2), O. 23 R. 3             | 96    |
| — V of 1908, Sec. 47, 102                       | 477   |
| — V of 1908, Sec. 48                            | 167   |
| — V of 1908, Sec. 80                            | 203   |
| — V of 1908, Sec. 110                           | 299   |
| — V of 1908, O. 30                              | 405   |
| — V. of 1908, O. 32 Rr. 3 (1), 4 (3)            | 293   |
| — V of 1908, O. 40 R. 1 (2)                     | 123   |
| — V of 1908, O. 41 Rr. 27 (1) (a), 28, 29       | 160   |
| — IX of 1908, Sec. 15 (1)                       | 163   |
| — IX of 1908, Sec. 19                           | 195   |
| — IX of 1908, Sch. I. Art. 46                   | 465   |
| — IX of 1908, Sch. I Arts. 62, 109, 120         | 508   |
| — IX of 1908, Sch. I. Art. 91                   | 563   |
| — IX of 1908, Sch. I. Arts. 140, 142, 144       | 141   |
| — IX of 1908, Sch. I. Art. 176                  | 405   |
| — IX of 1908, Sch. I. Art. 182                  | 397   |
| — III of 1909, Secs. 13 (3), 118                | 349   |
| — III of 1909, Sec. 36                          | 351   |
| — VI of 1913, Sec. 3 (6)                        | 444   |
| — II B. C. of 1866, Sec. 18                     | 198   |
| — V. B. C. of 1875, Sec. 40 (1)                 | 465   |

|                                                                                                                                          | PAGE. |
|------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Act VIII B. C. of 1876, Sec. 81                                                                                                          | 119   |
| — III. B. C. of 1884, Sec. 45                                                                                                            | 203   |
| — III B. C. of 1884, Secs. 85 (a), 87                                                                                                    | 283   |
| — II B. C. of 1893, Secs. 7, 15                                                                                                          | 203   |
| — IX C. P. of 1883, Sec. 42                                                                                                              | 1     |
| Adjudication order, when to be made; <i>See</i> Notice                                                                                   | 349   |
| Admissibility in evidence—Certificate given by Kabiraj—Kabiraj not examined; <i>See</i> Wakf                                             | 444   |
| — in evidence—Commissioner's report—Commissioner not examined; <i>See</i> Wakf                                                           | 444   |
| — in evidence—Unregistered deed of gift of immovable property valuing more than Rs. 100, executed in 1882; <i>See</i> Adverse possession | 432   |
| Adopted son's share—Sudras in Madras; <i>See</i> Partition                                                                               | 56    |
| Adoption—Fact, if to be proved by direct evidence; <i>See</i> Adverse possession                                                         | 432   |
| Adverse possession—Limited interest; <i>See</i> Landlord and tenant                                                                      | 133   |

*Adverse possession—Unregistered deed of gift, admissibility of—Hindu Law—Direct evidence of adoption, if necessary—Trustee, claiming adversely—Burden of proof—Erection of substantial building, if conclusive evidence of ouster of co-tenant—Co-tenant's possession where adverse—Co-tenant's right to possession—Evidence to show co-tenant's adverse possession, nature of—Joint owner effecting in good faith valuable improvements in joint property—His remedy.*

An unregistered deed of gift executed in 1882, of an immovable property of value exceeding Rs. 100, though could not, under section 49 of the Indian Registration Act of 1877, affect any immovable property comprised therein or be received as evidence of any transaction affecting such property, is admissible in evidence for a collateral purpose.

Delivery of possession given under such deed validates under the Hindu Law then in force the intended gift.

It is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist.

The burden lies upon the trustee to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner.

The erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster.

To establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive.

*Adverse possession—(Contd.).*

If possession may either be lawful, or unlawful in the absence of evidence, it must be assumed to be the former :

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants ; and they on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them.

One co-tenant may oust the others and set up an exclusive right of ownership in himself, and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenants does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants ; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse.

In order to render the possession of one co-tenant adverse to the others not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights.

No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. Acts, which might properly be held to show adverse possession as between strangers, do not necessarily have such effect as between tenants in common ; acts of ownership by one co-tenant may not in themselves amount to the disseizin of the other co-tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants, in order to render the possession adverse need not be by violent or intimidating expulsion or repulsion nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication ; it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. The overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants.

**Adverse Possession—(Contd.).**

A co-sharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence. Hence it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But, if no notice is given to the co-sharer, of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse, as to justify the inference of knowledge on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his right.

If a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of his property.

**Jagannath Marwari v Chandl Bibi** ... 432

**Adverse possession, continuance of—Land incapable of use and enjoyment by rightful owner ; See Title, declaration of** ... 302

—possession, nature of—**Title ; See Landlord and tenant** ... 133

—possession, what constitutes ; **See Possession, suit for** ... 465

—possession against limited estate holder ; **See Possession, suit for** ... 141

—possession between co-sharers, how constituted ; **See Adverse possession** ... 432

—possession by tenant, nature of ; **See Landlord and tenant** ... 133

—possessor—**Possession, nature of ; See Possession, suit for** ... 141

**Advice, independent and competent, meaning of ; See Pardanashin lady** ... 529, 563

**Agricultural lease—Lease, expiry of, before the passing of Bengal Tenancy Act (VIII of 1885)—Holding over—Bengal Tenancy Act, Section 67—Rate of interest—Exorbitant rate.**

Where an agricultural lease expired before the passing of the Bengal Tenancy Act, a tenant who holds over, is not liable to pay interest on the arrears of rent more than that mentioned in section 67 of the Act.

Where the rate of interest on arrears of rent as stated in the Kabuliati executed by a cultivating raiyat in favour of his landlord was 150 per cent. per annum :

**Held, that the rate was exorbitant. Chandra Nath Sorma Motayed v.**

**Sheikh Ismail** ... 369

**Alienation, if can prejudice another ; See Partition** ... 29

**Alteration in a document after execution and registration, made in good faith, to carry out the original intention of the parties, if vitiates the document ;**

**See Pardanashin lady** ... 313

—of instrument, what is ; **See Pardanashin lady** ... 333

—of an instrument, what, immaterial ; **See Pardanashin lady** ... 333

—of an instrument, when material ; **See Pardanashin lady** ... 333

**Amendment of plaint—Object ; See Pardanashin lady** ... 529

**Appeal—Bengal Tenancy Act (VIII of 1885), Section 153—Amount of rent annually payable—Question as to entire rent or share of rent.**

*Appeal—(Contd.).*

An appeal lies to the District Judge against the decision of the judicial officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act, as to the question, whether the plaintiff was entitled to the whole rent as claimed by him or only to a two-fifths share as asserted by the defendant. Such decision is a decision of the question of the amount of rent annually payable by the tenant. *Sudhanya Santra v. Basanta Kumar Sarkar* ... 579

*Appeal—Decree in favour of a party, if can appeal—Letters Patent, cl. (15)—Order passed in the exercise of revisional jurisdiction—Order, if to be passed with jurisdiction.*

A party cannot appeal against a decree in his favour, solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree.

An appeal under clause 15 of the Letters Patent does not lie from an order made in the exercise of revisional jurisdiction, whether such order was or was not made with jurisdiction. *Byomkes Seth v. Bhut Nath Pal* ... 489

*—Order in execution of Small Cause Court decree transferred to ordinary Court—Civil Procedure Code (Act V of 1908), Sec. 47—Party—Defendant.*

An order in execution of a Small Cause Court decree passed by a Small Cause Court Judge, is final. But, when the decree has been transferred to the ordinary Court to be executed as it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in execution of decrees passed by that Court, although a second appeal would be barred under section 102 of the Code of Civil Procedure.

Although a Court expressed an opinion that A, the widow of a deceased debtor, was not a proper party in a suit by the creditor against the heirs, because she was not one of the heirs, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the immovables of the estate. On this basis the suit was tried against her and she succeeded on the merits.

*Held*, that A was a party to the suit within the meaning of section 47 of the Code of Civil Procedure. An objection raised by her to the attachment of properties covered by the conveyance executed in her favour by the deceased debtor, was comprehended within the scope of section 47; the decision of such a question operated as a decree under section 2 of the Code and was appealable in the same manner as other decrees under section 96. *Jaminibala Debi v. Karali Prasad Mukherjee* ... 477

*—, right of—Party dismissed from record, if can appeal—Prejudice.*

A suit was brought for recovery of compensation for short delivery of goods against A and B. The suit was dismissed with costs. On a petition being filed by the plaintiff in the lower Court to make C a party defendant in place of B, B was ordered to be removed from the record and the

## Appeal—(Contd.).

suit was remanded for trial *de novo*. B was given costs in the primary Court, but no cost was awarded him in the lower appellate Court. B appealed to the High Court :

*Held*, that B. was competent to question the propriety of the order by way of appeal even though he is not competent to question the propriety of the order in so far as it directed C to be made a party, as the order of the lower appellate Court was to deprive him of the costs allowed by the first Court. *Agent, B. N. W. Railway Company v. Jagannath Agarwala* ... 475

— imperfectly constituted—Appeal abated in part ; *See* Partnership ... 405

Appellate Court—Conflict of testimony ; *See* Collision ... 178

— Court—Interference with finding of fact—Will, genuineness of ; *See* Will ... 384

— Court, duty of—Evidence improperly excluded by trial Court ; *See* Evidence, admissibility of ... 160

— Court—Statement in judgment as to admission ; *See* Title, declaration of ... 302

— Court, if can remand an issue not raised in pleadings ; *See* Prescription ... 319

Application by mortgagee creditor to be entered in the list of scheduled creditors—Civil Procedure Code, Sec. 48—Personal decree in favour of mortgagee—Insolvency of judgment-debtor ; *See* Limitation ... 167

Arbitration—*Regularity of form, observance of—Principle of justice—Arbitrator receiving information from one side—Presence of both sides necessary—Procedure—Misconduct vitiating an award—Indian irregularities in Arbitration (Act IX of 1899), Secs. 13 (1), 14—Award, when remitted—Award, when set aside—Court differing on merits of dispute between parties.*

Although a Court should not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents.

In arbitration proceedings both sides must be heard, and each in the presence of the other ; however immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent.

It is indisputable to the impartial administration of justice between the parties that both should be present when proof is being led by either ;

**Arbitration—(Contd.).**

the same rule applies to an inspection or an experimental test which are regarded as practical proof.

If irregularities in procedure are proved which amount to no proper hearing of the matters in dispute that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator.

Courts have been invested with statutory authority to remit an award only in comparatively recent times.

The Court may remit an award when an arbitrator has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive, the Court will not hesitate to remit the award to the arbitrator instead of setting it aside.

An arbitrator is the Judge chosen by the parties; he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside, merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision. *Hari Singh-Nehal Chand v. Kankinarah Co. Ltd.* ... .. 39

|                                                                          |    |
|--------------------------------------------------------------------------|----|
| — conducted as legal arbitration—Justice, principles of; <i>See</i>      |    |
| Arbitration ... ..                                                       | 39 |
| — conducted as mercantile—Justice, principles of; <i>See</i> Arbitration |    |
| ... ..                                                                   | 39 |
| — proceeding—Procedure—Hearing; <i>See</i> Arbitration                   |    |
| ... ..                                                                   | 39 |

|                                                                                                                        |     |
|------------------------------------------------------------------------------------------------------------------------|-----|
| Arbitrator, if receiving information from one side and not disclosed to other, if right; <i>See</i> Arbitration ... .. | 39  |
| — position of; <i>See</i> Arbitration ... ..                                                                           | 39  |
| — not acting exclusively on grounds within their jurisdiction; <i>See</i> Award ... ..                                 | 253 |

**Assessment—Bengal Municipal Act (III B. C. of 1884) secs. 85 (a), 87—Circumstances and property—Several persons—Liability of each—Other person in joint occupation—Assessment lists, defective.**

*Per Curiam*: Where the sale proceeds of tea grown outside the local limits of the Municipality are brought within the Municipal limits and placed in the Bank to the credit of the Companies, they may be described as their 'circumstances and property,' that is their 'means and property' within the Municipality, and furnish a just measure of their liability to assessment under section 85 (a) of the Bengal Municipal Act.



**Assessment—(Contd.).**

Section 85 (a) of the Bengal Municipal Act is not limited in its application to a case where only one person occupies an entire holding. Where personal tax is in operation, several persons occupying the same holding are each subject to assessment, according to their respective circumstances and property within the Municipality.

Where the assessment list does not show the income upon which the tax was assessed, it is a defect of form and does not invalidate the assessment.

Every defect in the assessment list prepared under section 87 of the Bengal Municipal Act, does not destroy the jurisdiction of the Commissioner and render the assessment *ultra vires*.

*Per Mookerjee, J.*: What constitutes the circumstances and property of a person within the Municipality within the meaning of section 85 (a) of the Bengal Municipal Act, depends upon the facts of the particular case.

To determine, whether in a given set of circumstances, a person may be said to be in occupation of a holding for purpose of assessment of rates and taxes, various tests are to be applied.

Where the possession of a holding by each of the persons is actual, is as of right, and is not of a transient character, such possession, if being exclusive, constitutes 'occupying a holding' within the meaning of section 85 (a) of the Bengal Municipal Act. The statement that occupation must be exclusive, does not mean that nobody else has any right in the premises.

If a tax is assessed on a person as occupier, he does not cease to be occupier because other persons are jointly in occupation with him. **Chairman Jalpaiguri Municipality v. Jalpaiguri Tea Company Ltd.** ... .. 283

—, if invalid—Assessment list not showing the income upon which the tax was assessed; *See* Assessment ... .. 283

— of Court-fee, valuation for—Valuation for purposes of jurisdiction; *See* Jurisdiction ... .. 94

Attachment of decree before it is drawn up; *See* Decree ... .. 494

**Attesting witness—Scribe—Document, execution of—Evidence Act (I of 1872), Secs. 68, 70.**

An attesting witness to a document is a witness in whose presence the document is executed.

A scribe by reason of his having signed the name of the executant on the document on his behalf, is not a competent attesting witness.

Proof of execution of a document required to be attested by calling one attesting witness under section 68 of the Evidence Act, is not required under section 70 where the execution of the document is admitted by the executant. **Paban Khan v. Badal Sardar** ... .. 498

— witnesses, if all to be examined; *See* Will ... .. 384

— witness, who is; *See* Attesting witness ... .. 498

*Award—Bad not separable from good—Arbitrators making award on grounds some of which are bad—No proof that arbitrator acted exclusively on grounds within their jurisdiction.*

If the bad is not separable from the good, the whole is bad.

An award made by arbitrators on grounds some of which did, while the others did not, justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators acted exclusively on grounds within their jurisdiction, the award is null and void. *Hurankhroy Ram Chunder v. The Japan Cotton Trading Co.* ... 253

—, if to be set aside—Court differing in opinion from arbitrator upon merits of dispute submitted to him; *See Arbitration* ... 39

—, null and void—Award made by arbitrators on grounds some of which did, while others did not, justify the exercise of their jurisdiction—Court cannot hold with certainty that arbitrators acted exclusively on grounds within their jurisdiction; *See Award* ... 253

—, when remitted; *See Arbitration* ... 39

Bad not separable from good; *See Award* ... 253

bankruptcy proceeding—Debt barred by limitation; *See Limitation* ... 167

— proceeding—Debt not barred at commencement; *See Limitation* ... 167

Bar of time, when ceases to run—Adjudication—Bankruptcy; *See Limitation* ... 167

Bengal Municipal Act, Section 45—Delegation of power to Vice-Chairman—Powers under the Licensed Warehouse and Firebrigade Act; *See License, refusal of* ... 203

—, Section 85(a)—Circumstances and property—Proceeds of tea grown outside the local limits of Municipality but brought within Municipal limits; *See Assessment* ... 283

—, Section 85(a)—'Circumstances and property', what constitutes; *See Assessment* ... 283

—, Section 85(a)—Occupier—Persons jointly in occupation; *See Assessment* ... 283

—, Section 85(a)—'Occupying a holding'—Possession by several persons; *See Assessment* ... 283

—, Section 85(a)—Several persons occupying the same holding, if each subject to assessment—Personal tax; *See Assessment* ... 283

—, Section 87—Defect in assessment list, effect of; *See Assessment* ... 283

Bengal Survey Act, Section 40(1), possessory order under; *See Possession, suit for* ... 465

Bengal Tenancy Act, section 16—Applicable, if, to person claiming rent as purchaser from person to whom rent accrued due; *See Landlord and tenant* ... 119

—, section 16, a penal provision; *See Landlord and tenant* ... 119

—, section 20—Raiyat at a fixed rate, if can acquire a right of occupancy; *See Ejectment* ... 233

—, section 61—Deposits, if valid—Three deposits for alleged three tenancies—Holding one tenancy; *See Deposit* ... 501

|                                                                                                                                                                                             |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Bengal Tenancy Act, section 62—Landlord, if can question the validity of deposits—Deposits accepted by Court—Three deposits for alleged three tenancies—One tenancy; <i>See</i> Deposit ... | 501 |
| —, section 67—Interest on arrears of rent—Tenant holding over—Lease expired before the passing of the Bengal Tenancy Act; <i>See</i> Agricultural lease ...                                 | 369 |
| —, section 95(a)—Estate—Lands handed over and lands reformed; <i>See</i> Possession, suit for ...                                                                                           | 205 |
| —, section 97—Estate coming under Court of Wards under section 95(a) of the Bengal Tenancy Act—Power of manager to sue; <i>See</i> Possession, suit for ...                                 | 205 |
| —, section 103B(3)—Entry—Non-agricultural land; <i>See</i> Presumption ...                                                                                                                  | 504 |
| —, section 103B—Incorrectness of entry made in finally published record of rights—Burden of proof; <i>See</i> Landlord and tenant ...                                                       | 133 |
| —, section 148A—Suit under—Relief, nature of; <i>See</i> Possession, suit for ...                                                                                                           | 462 |
| —, section 153—Amount of rent annually payable—Question as to liability to pay entire rent or share of rent; <i>See</i> Appeal ...                                                          | 579 |
| —, section 160—Protected interest—Interest of a raiyat at a fixed rate, occupying for a continuous period of more than twelve years; <i>See</i> Ejectment ...                               | 233 |
| —, sch. III Art. 3—Dispossession by tenant settled by co-sharer landlord; <i>See</i> Possession, suit for ...                                                                               | 462 |
| —, sch. III Art. 6—Rent decree valued less than Rs. 500—Acknowledgment, if extends time—Limitation Act, section 19; <i>See</i> Limitation ...                                               | 195 |
| Bond—Either party, if can show that consideration, though recited in the bond, was in reality different; <i>See</i> Pardanashin lady ...                                                    | 333 |
| —Either party, if can show non-payment of consideration, though payment recited; <i>See</i> Pardanashin lady ...                                                                            | 333 |
| —Validity, if effected—Consideration recited, not paid in full—Bond, how far effective; <i>See</i> Pardanashin lady ...                                                                     | 333 |
| —, how far effective—Consideration recited, not paid in full; <i>See</i> Pardashin lady ...                                                                                                 | 333 |
| Bona fide trespasser and <i>mala fide</i> trespasser, difference between, as regards payment of mesne profits; <i>See</i> Mesne profits ...                                                 | 415 |
| Book, containing history of a district, admissibility of; <i>See</i> Possession, suit for ...                                                                                               | 205 |
| Burden of proof—Deed, obtaining of, by misrepresentation—Information received at long time before; <i>See</i> Pardashin lady ...                                                            | 563 |
| Burden of proof—Diluvion—Rent, abatement of—Diluvion, extent of.                                                                                                                            |     |

As soon as the fact of diluvion has been established by a tenant, if there be no express agreement to the contrary, in a case arising before the Bengal Tenancy Act came into force, the tenant is entitled to abatement of rent; and the burden thereupon shifted to the landlord to prove the reduced amount of rent justly recoverable by him, which could be done only by proof of the extent of the diluvion. *Raja Kristo Das Law v. Abdul Karim*

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | PAGE. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Burden of proof—Incorrectness of entry made in finally published record of rights—Bengal Tenancy Act, Section 103B; <i>See</i> Landlord and tenant ...                                                                                                                                                                                                                                                                                                          | 133   |
| — of proof—Initial onus, in whom lies, when not necessary; <i>See</i> Landlord and tenant ...                                                                                                                                                                                                                                                                                                                                                                   | 133   |
| — of proof—Insolvent waiving omission of service of notice; <i>See</i> Notice ...                                                                                                                                                                                                                                                                                                                                                                               | 349   |
| — of proof—Particular land included in Permanent Settlement; <i>See</i> Possession, suit for ...                                                                                                                                                                                                                                                                                                                                                                | 141   |
| — of proof—Party propounding a Will; <i>See</i> Will ...                                                                                                                                                                                                                                                                                                                                                                                                        | 384   |
| — of proof—Recital as to payment of consideration money—Execution admitted by or proved against, mortgagor; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                     | 333   |
| — of proof—Recital as to payment of consideration money—Mortgage security contested by stranger to bond—Denial of execution; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                    | 333   |
| — of proof—Separate estate—Family joint—Nucleus of joint property; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                              | 563   |
| — of proof—Trustee, when became faithless to the trust imposed upon him; <i>See</i> Adverse possession ...                                                                                                                                                                                                                                                                                                                                                      | 432   |
| — of proof, if shifted by production of thak and survey maps—Particular land included in Permanent Settlement; <i>See</i> Possession, suit for ...                                                                                                                                                                                                                                                                                                              | 141   |
| — of proof, question of, when immaterial; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                                                       | 333   |
| — of proof, question as to, when immaterial; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                                                    | 529   |
| — of proof, question of, when arises; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                                                           | 333   |
| Burial ground, land for use as—Easement; <i>See</i> Prescription ...                                                                                                                                                                                                                                                                                                                                                                                            | 319   |
| — ground land, how acquired; <i>See</i> Prescription ...                                                                                                                                                                                                                                                                                                                                                                                                        | 319   |
| Calcutta Suburban Police Act, Section 19—Stall in public road in which soda water is sold; <i>See</i> Place of public resort ...                                                                                                                                                                                                                                                                                                                                | 108   |
| Cause, determination of; <i>See</i> Collision ...                                                                                                                                                                                                                                                                                                                                                                                                               | 178   |
| —, determination in a, to be provided upon what; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                                                | 529   |
| Central Provinces Tenancy Act, Section 42—Decree for sale—Form of decree altered by consent at the instance of mortgagor; <i>See</i> Estoppel ...                                                                                                                                                                                                                                                                                                               | 1     |
| Certificated guardian, consent of, if necessary, for his appointment as guardian <i>ad litem</i> ; <i>See</i> Title, declaration of ...                                                                                                                                                                                                                                                                                                                         | 302   |
| — guardian, if to signify his consent before appointment; <i>See</i> guardian ...                                                                                                                                                                                                                                                                                                                                                                               | 293   |
| — guardian, not signifying his consent before appointment as guardian <i>ad litem</i> , appealing against decree passed against minor, effect of; <i>See</i> Guardian ...                                                                                                                                                                                                                                                                                       | 293   |
| Charge, adding of—Criminal Procedure Code, Sections 226, 227—Indian Penal Code, Sections 497, 498, complaint of husband under; <i>See</i> Prosecution ...                                                                                                                                                                                                                                                                                                       | 51    |
| Chaukidari chakran land—Land resumed—Putni lease—No contract as to rent payable for the chakran land—Zemindar, if entitled to rent.                                                                                                                                                                                                                                                                                                                             |       |
| • Where the contract between the parties, that is the putni lease, does not contain any stipulation as to the rent payable for the chakran lands to the zemindar, the latter is entitled to some rent in addition to the amount payable to the chaukidari fund. As to the amount of such additional rent, different views have been taken in different cases. In the present case, as there are no materials on the record, the putnidar was given something on |       |

**Chowkidari Chakran Land—(Contd.).**

|                                                                                                                                                                                                           |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| account of collection charges. Maharajadhiraj Sir Bejoy Chand Mohatap Bahadur v. Krishna Chandra Mukherjee                                                                                                | 275 |
| Civil Procedure Code of 1882, section 211—'Decree' meaning of; See Mesne profits                                                                                                                          | 415 |
| — (1882), Section 443—Consent of certificated guardian, if necessary for his appointment as guardian <i>ad litem</i> ; See Title, declaration of                                                          | 302 |
| —, Section 2(2)—Decree given in accordance with terms come to between parties; See Lis pendens                                                                                                            | 96  |
| —, Section 47—Party—Person, not a proper party, but treated as such; See Appeal                                                                                                                           | 477 |
| —, Section 48—Mortgage decree directing sale of other properties in case the mortgaged property be insufficient to pay off the debt—Time, when runs; See Limitation                                       | 167 |
| —, Section 48—Time, when runs—Mortgagee not paid in full—Personal decree—Insolvency of judgment-debtor—Application by mortgagee creditor to be entered in the list of scheduled creditors; See Limitation | 167 |
| —, Section 80—Suit governed by special law of limitation—Party if entitled to deduct 2 months for service of notice; See Possession, suit for                                                             | 205 |
| —, Sec. 102—Second appeal—Order in execution of decree passed by Small Cause Court, transferred to ordinary Court; See Appeal                                                                             | 477 |
| —, Sec. 110—Decree, variation of, as to costs—Appeal dismissed on merits; See Judgment of affirmance                                                                                                      | 299 |
| —, O. 2 R. 2—Causes of action different; See Possession, suit for                                                                                                                                         | 465 |
| —, O. 30—Suit, form of—Firm dissolved before suit—Cause of action; See Partnership                                                                                                                        | 405 |
| —, O. 30—Suit in the name of the firm—Proceedings, how long continues; See Partnership                                                                                                                    | 405 |
| —, O. 32 R. 3 (1)—Guardian of minor defendant; See Guardian                                                                                                                                               | 293 |
| —, O. 32 R. 4 Sub-R. (3)—Proposed guardian not signifying consent, effect of; See Guardian                                                                                                                | 293 |
| —, O. 32 R. 4 Sub-R. (3)—Restriction upon Court's power; See Guardian                                                                                                                                     | 293 |
| —, O. 32 R. 4 sub-R (3), mandatory; See Guardian                                                                                                                                                          | 293 |
| —, O. 40 R. 1 (2)—Finding as to allegations necessary; See Receiver                                                                                                                                       | 123 |

**Collision—Plaint—Determination in a cause—Defendant's opportunity to meet plaintiff's case—Appellate Court—Conflict of testimony.**

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

**Collision—(Contd.).**

The fact that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet, is of special importance in collision cases, where the accident happens very often in an entirely unexpected manner and in an extremely short space of time, thus rendering an accurate observation of the elements of the incident difficult in the highest degree. In this class of cases, it has consequently been considered specially necessary that the plaintiff, in framing his statement of claim, should set out the circumstances of the collision, so far as they are known to him, with clearness and accuracy to enable his adversary to know the case he has to meet; he should also state in specific terms the particular acts of negligence which, according to him, caused the collision.

In order to reverse the decision of the Court below upon a point where there is a clear conflict of testimony, the Court of appeal should, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. *W. J. Rees v. John Young* ... 178

|                                                                                                                                   |          |
|-----------------------------------------------------------------------------------------------------------------------------------|----------|
| <b>Collision cases—Plaint; See Collision</b> ...                                                                                  | 178      |
| <b>Compensation to owners for acquisition of land—Present purpose—Other beneficial purpose; See Land acquisition</b> ...          | 188      |
| <b>———— to owners for acquisition of land—Principle; See Land acquisition</b> ...                                                 | 188      |
| <b>Compromise, decree on, effect of; See Lis pendens</b> ...                                                                      | 96       |
| <b>————, when effective; See Pardanashin lady</b> ...                                                                             | 529      |
| <b>Concurrent lessee, right of; See Intermediate tenure</b> ...                                                                   | 79       |
| <b>Constructive possession—Wrong-doer—Position of land; See Possession, suit for</b> ...                                          | 465      |
| <b>———— possession of land—Intervention of public authorities for preservation of peace; See Title, declaration</b> ...           | 302      |
| <b>Continuity, presumption of—Applicability; See Possession, suit for</b> ...                                                     | 205      |
| <b>Contract—Tenancy created under decree on consent; See Ejectment</b> ...                                                        | 157      |
| <b>———— Act, Sec. 257—True accounts and full information, when to be given; See Partnership</b> ...                               | 405      |
| <b>Co-owner erecting substantial building on joint property, if constitutes ouster; See Adverse possession</b> ...                | 432      |
| <b>Corroboration—Statement made to investigating Police officer by relative of prosecutor; See Evidence, admissibility of</b> ... | 53       |
| <b>Co-tenant, ouster by, what constitutes; See Adverse possession</b> ...                                                         | 432      |
| <b>———— in good faith making valuable improvement upon common property at his own expense; See Adverse possession</b> ...         | 432      |
| <b>————'s right to occupy common property; See Adverse possession</b> ...                                                         | 432      |
| <b>Confli. duty of—Deed executed by pardanashin lady; See Pardanashin lady</b> ...                                                | 529, 563 |
| <b>———— If can delegate power of enquiry to receiver; See Receiver</b> ...                                                        | 123      |
| <b>Court's decision, to rest on what; See Decision of Court, to rest on what</b> ...                                              | 256      |
| <b>———— decision, to rest on what; See Title declaration of</b> ...                                                               | 302      |
| <b>———— decision, to rest on what; See Pardanashin lady</b> ...                                                                   | 333      |

|                                                                                                                                                                        | PAGE. |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Court's decision, to rest upon what ; <i>See</i> Evidence, admissibility of                                                                                            | 107   |
| — duty, when called upon to deal with deed executed by pardanashin lady ; <i>See</i> Pardanashin lady                                                                  | 313   |
| — duty, when the order for discovery is alleged to be disobeyed ; <i>See</i> Discovery                                                                                 | 351   |
| — power to remit award ; <i>See</i> Arbitration                                                                                                                        | 39    |
| Court-fee, assessment of, valuation for—Valuation for purposes of jurisdiction ; <i>See</i> Jurisdiction                                                               | 94    |
| Court-Fees Act, Sec. 7 (X) (c)—Suits Valuation Act, Sec. 8—Suit for specific performance of contract of leases ; <i>See</i> Jurisdiction                               | 94    |
| Criminal Procedure Code, Sec. 137—Fixing arbitrarily time for cross-examination— <i>Bonafides</i> of claim, finding as to, necessary ; <i>See</i> Unlawful obstruction | 172   |
| —, Sec. 145—Final order based on no evidence ; <i>See</i> Jurisdiction                                                                                                 | 127   |
| —, Sec. 145 (4)—Trial Magistrate, duty of—Reason for decision ; <i>See</i> Jurisdiction                                                                                | 125   |
| —, Secs. 226, 227—Indian Penal Code, Secs. 497, 498, complaint of husband under—Adding of charge ; <i>See</i> Prosecution                                              | 51    |
| —, Sec. 404—Order according consent to withdrawal from prosecution, nature of ; <i>See</i> Prosecution                                                                 | 51    |
| —, Sec. 531—Offence committed outside the territorial jurisdiction of trying Court—Objection taken at an early stage—Prejudice ; <i>See</i> Jurisdiction               | 200   |
| Cultivating rights, question as to—Rights to be sold ; <i>See</i> Estoppel                                                                                             | 1     |
| Custom, requisites of ; <i>See</i> Prescription                                                                                                                        | 319   |
| — and prescription, difference between ; <i>See</i> Prescription                                                                                                       | 319   |
| Customary right, to be specifically pleaded ; <i>See</i> Prescription                                                                                                  | 319   |
| Dattaka Chandrika, authority of—Propositions not based upon authentic text ; <i>See</i> Partition                                                                      | 56    |
| Debt, if barred by limitation—Debt not barred at commencement of bankruptcy proceeding ; <i>See</i> Limitation                                                         | 167   |
| — barred by limitation, if provable in bankruptcy proceedings ; <i>See</i> Limitation                                                                                  | 167   |
| Decision—Substance and real meaning of parties to be looked at ; <i>See</i> Family settlement                                                                          | 323   |
| —, earlier, operating as <i>res judicata</i> —Suits for damages—Suits tried together upon same evidence—Issue common to both—Separate judgment <i>See Res judicata</i> | 281   |
| — of Court, to rest on what ; <i>See</i> Pardanashin lady                                                                                                              | 313   |
| — of Court, to rest on what ; <i>See</i> Title, declaration of                                                                                                         | 302   |
| — of Court to rest upon what ; <i>See</i> Evidence, admissibility of                                                                                                   | 107   |
| — of Court, to rest on what.                                                                                                                                           |       |
| The decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. <i>Bepin Krishna Roy v. Jogeshwar Roy</i>              | 256   |

**Decree—Attachment, if valid—Attachment of decree before it is drawn up.**

When a person has the judgment of the Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time. *Ram Kanai Pal v. Puna Chandra (alias)*

*Jogeswar Poddar* ... .. 494

—, effect of—Decree against defendant misdescribed as minor under the guardianship—Subsequent suit, maintainability of; *See* Title, declaration of ... .. 302

—, execution of—Decree absolute, incapable of execution—Decree, amendment of—Time, when runs—Limitation Act (IX of 1908), Sch. I, Art. 182.

Where the original decree is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up.

A preliminary decree on a mortgage suit was passed on the 19th June, 1910. On the 10th July, 1913, the decree was made absolute. The decree not having contained the names of the decree-holders and judgment-debtors except one, was amended on the 26th August, 1916:

*Held*, that time ran from the date of amendment and an application for execution of decree made on the 9th July, 1919, was in time. *Sasmita Sani v. Dinabandhu Giri* ... .. 397

—, interpretation of—Reference, if can be made to judgment and pleadings; *See* Mesne profits ... .. 418

—, reversal of—Evidence improperly excluded by trial Court—Civil Procedure Code, O. 41 Rr 27 (\*) (a), 28, 29; *See* Evidence, admissibility of ... .. 160

—, Small Cause Court, transferred to ordinary Court for execution—Order passed in execution; *See* Appeal ... .. 477

—, when a person obtains; *See* Decree ... .. 494

—, affirmed by appellate Court, effect of; *See* Mesne profits ... .. 415

—, on compromise, effect of; *See* *Lis pendens* ... .. 96

—, for rent against some person interested in tenancy, when binds all persons interested; *See* Title, declaration of ... .. 302

—, reversed by appellate Court, effect of; *See* Mesne profits ... .. 415

**Deed, execution of, by pardanashin lady**—Court called upon to deal with such deed, duty of; *See* Pardānashin lady ... .. 333

—, execution of, by pardanashin lady—Fair transaction; *See* Pardānashin lady ... .. 529, 563

—, if invalid—Absence of advice; *See* Pardānashin lady ... .. 529

—, if invalidated—Misrepresentation—Confidence; *See* Pardānashin lady ... .. 529, 563

—, when invalidated—Equity; *See* Pardānashin lady ... .. 529, 563

—, executed by pardānashin lady; *See* Pardānashin lady ... .. 529, 563

—, of doubtful import; how construed; *See* Limitation ... .. 129

—, of family settlement—Quantum of consideration; *See* Pardānashin lady ... .. 529

**Defective form**—Assessment list not showing the income upon which the tax was assessed—Assessment, if invalidated; *See* Assessment ... .. 283



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Delay, short of the period prescribed by the Limitation Act when a bar to a suit for specific performance of a contract to grant a putni lease ; <i>See</i> Specific performance ... ..                                                                                                                                                                                                                                                                                                                                                                                                | 364 |
| Delegation of power by Chairman—Bengal Municipal Act, Sec. 45—Licensed Warehouse and Firebrigade Act, Sec. 15 ; <i>See</i> License, refusal of ...                                                                                                                                                                                                                                                                                                                                                                                                                                     | 203 |
| Deposit— <i>Bengal Tenancy Act (VIII of 1885) sections 61, 62—One tenancy—Deposits for three tenancies—Deposits accepted by Court—Landlord, if can question validity of deposits.</i>                                                                                                                                                                                                                                                                                                                                                                                                  |     |
| If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, the deposits are not valid within the meaning of section 61 of the Bengal Tenancy Act. The landlord can question their validity, although they were accepted by the Court under section 62. <i>Satis Chandra Das v. Umes Narain Chaudhuri</i> ... ..                                                                                                                                                                              | 501 |
| Discovery— <i>Presidency Towns Insolvency Act (III of 1909), Sec. 39—Order, wilful disobedience of, effect of—Person ordered, duty of.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                             |     |
| An order for discovery made under section 36 of the Presidency Towns Insolvency Act may, if disobeyed involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court. In view of such possibilities, the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were not in existence or were not under his control. <i>Sukhlal Karwani v. The official Assignee of Calcutta</i> ... .. | 351 |
| Determination in a cause to be founded upon what ; <i>See</i> Pardanashin lady ...                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 529 |
| Duvelon, extent of—Landlord ; <i>See</i> Burden of proof ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 35  |
| Discretion, decision resting on—Varying views of lower Courts—Privy Council ; <i>See</i> Partition ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 56  |
| Disobedience, wilful, of order for discovery, effect of— <i>Presidency Towns Insolvency Act, Sec. 36 ; See</i> Discovery ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 351 |
| Dissolution of partnership—No fixed term agreed upon for the duration of partnership ; <i>See</i> Partnership ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 405 |
| Divorce— <i>Iddat, period of—Talak-i-bain—Talak-ahsan—Talak-hasan.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |     |
| A divorce in the case of talak-i-bain or irrevocable talak takes effect from the date of the writing and not from the date of its receipt by the wife, unless there are words in the instrument which show a different intention.                                                                                                                                                                                                                                                                                                                                                      |     |
| The option to revoke in the case of talak-ahsan continues till the expiration of the period of iddat, and in the case of talak-hasan, till the third pronouncement. <i>Mohan Molla v. Baru Bibi</i> ... ..                                                                                                                                                                                                                                                                                                                                                                             | 524 |
| Document—Execution, proof of—Execution admitted—Attesting witness, if to be called— <i>Evidence Act, Secs. 68, 70 ; See</i> Attesting witness ...                                                                                                                                                                                                                                                                                                                                                                                                                                      | 498 |
| ————, if proves itself ; <i>See</i> Will ... ..                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 373 |

Document, if vitiated—Alteration after execution and registration, made, in good faith, to carry out the original intention of the parties ; *See* Pardashin lady ... 333

Earlier decision operating as *res judicata*—Suits for damages—Suits tried together upon same evidence—Issue common in both—Separate judgments ; *See Res judicata* ... 281

Easement—Beneficial enjoyment of land—Right to bury in a given tract of land ; *See* Prescription ... 319

—Right to bury in a given tract of land ; *See* Prescription ... 319

—Transfer of one part of tenement—Condition of land transferred, how determined—Accommodation—Severance—Easement of necessity—Presumption.

Where the owner of two tenements or of one tenement divided into two parts, transfers one part he puts an end by contract to the relation which he had himself created between the land sold and the land retained. He discharges the land so sold from any burden imposed upon it during his joint occupation ; the condition of such land is thenceforth determined by the contract of alienation and not by the previous user of the former common owner during his common ownership.

Where a man disposes of part of his land and that part affords an accommodation to the part retained, that accommodation will, upon severance, ripen into an easement, if it be such as to be absolutely necessary for the enjoyment of the part retained and the accommodation be such that it is capable of constituting the subject matter of an easement.

Where an owner grants part of his land and retains other part himself, although the grantee may be in a more favourable position than the grantor so far as the grantee may claim all easements necessary for reasonable enjoyment of the part so granted, the grantor may claim that all 'easements of necessity' without which no enjoyment at all would be possible should be raised by implication in favour of the part retained.

Tustee Mondal v Kuararam Mondal ... 518

—, constituting nuisance, if can be created ; *See* Prescription ... 319

—by prescription—Dead bodies placed in graves on the land of another and permitted to remain there for the prescriptive term ; *See* Prescription ... 319

—of necessity—Presumption—Part of tenement retained by grantor after disposing ; *See* Easement ... 518

Ejectment—Raiyat holding at fixed rate, if can acquire right of occupancy—'Protected interest'—Bengal Tenancy Act (VIII of 1885), Sections 20, 21, 160 (d), 167—*Previous history of an Act, when can be resorted to.*

*Per curiam* : The interest of a raiyat at a fixed rate, who has occupied his holding for a continuous period of more than twelve years, is a protected interest within the meaning of section 160 of the Bengal Tenancy Act and cannot be annulled by a notice under section 167.

A raiyat at a fixed rate may become a settled raiyat of the village under

**Ejectment—(Contd.):**

section 20 of the Bengal Tenancy Act and thus acquire a right of occupancy within the meaning of section 21.

The status of a raiyat at a fixed rate can be combined with that of an occupancy raiyat.

*Per Richardson J:* The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extended.

Where an Act speaks with an uncertain or ambiguous voice, resort may be had to the previous history of the subject for light and guidance in construing its provisions. *Sarbshawar Patra v. Maharaja Sir Bejoy Chand Mohatap* ... .. 233

— *Revenue Sale Law (Act XI of 1859), Section 37—'Settlement'—Contract with Government—Bajepati taluq.* •

The word 'settlement' in section 37 of the Revenue Sale Law refers not to the Permanent Settlement of 1793 but to the contract with Government. In the case of a *Bajepati* taluq, the contract with Government is made when revenue is assessed thereon and is transformed into revenue paying estate liable to be sold for its arrears. *Mokbul Ali Sadagar v. Basarat Ali* ... .. 485

— *Tenancy created under decree on consent—Provision for ejectment, legality of, test of—Relief against forfeiture—Executing Court.*

The legality of a provision for ejectment is to be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court will not, in such circumstances, assist the decree-holder to achieve his illegal purpose in defiance of express statutory prohibition.

When a tenancy is created by virtue of a decree on compromise, for a period of nine years to be held at a certain annual rent, the tenant is liable to be ejected only in accordance with the provisions of the Bengal Tenancy Act and not in accordance with the provisions of any contract between the parties to the contrary.

The circumstance that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether, on equitable grounds, relief could have been granted against forfeiture, if it had been called upon to enforce the agreement itself.

It is competent to the Court to grant relief against forfeiture in execution. *Gopal Krishna Nath v. Hari Nath Kapurth* ... .. 157

—, provision for, legality of—*Tenancy created under decree on consent; See Ejectment* ... .. 157

*Ekrarnama*—Estate not strictly life estate; *See Limitation* ... .. 129

*Endowment*, if invalid—Existence of mortgage at the time of creation of endowment; *See Wakf* ... .. 444

|                                                                                                                                                                                                                                                                                    |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Emfranchisement of Karnam lands—Enures for whose benefit ; See Land-law of Madras                                                                                                                                                                                                  | 16  |
| Entry in the record of rights—Non-agricultural land—Bengal Tenancy Act, Section 103B (3) ; See Presumption                                                                                                                                                                         | 504 |
| Erroneous omission to object to reception of evidence ; See Evidence, admissibility of                                                                                                                                                                                             | 107 |
| Estoppel—Mortgage—Decree for sale—Form of decree altered by consent at the instance of mortgagor—Mortgagor estopped from relying on altered form to defeat the purpose for which alteration was made—Sir lands in Central Provinces—Central Provinces Act (IX of 1883) section 42. |     |

The central Provinces Tenancy Act, section 42, provides that " Every person whose proprietary rights in lands comprising *sir* land . . . are sold in execution of any decree which does not expressly direct the sale of his rights in the *sir* land, shall become an occupancy tenant of that *sir* land ".

A decree for sale in terms specified that cultivating rights in *sir* were included. This was modified at the instance of the judgment-debtor (mortgagor) and the words " all actual and reputed rights in the *sir* land " substituted, it being agreed between the parties that the question whether such rights included the cultivating right should be left over.

Thereafter the mortgagors contended that the modified decree did not comply with the literal wording of section 42 above cited, whether or not the mortgagee was entitled on the merits to sell the cultivating right :

*Held*, that it was not open to the mortgagors to assert that by the result of the alteration the rights of the mortgagee under the original decree were taken away.

Their Lordships observed that it was unfortunate that the lower Court should have left over the question whether the rights to be sold included the cultivating rights, and that such question should have been decided at the time. *Gulab Singh v. Diwan Bahadur Ballabhadra* . . . . . 1

|                                                                                                                                                                                                                                                                                                                     |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Evidence—State of health of the settlor on the date of the deed of Wakf is not available ; See Wakf                                                                                                                                                                                                                 | 444 |
| —, admissibility in—Certificate given by Kabiraj—Kabiraj not examined ; See Wakf                                                                                                                                                                                                                                    | 444 |
| —, admissibility in—Commissioner's report—Commissioner not examined ; See Wakf                                                                                                                                                                                                                                      | 444 |
| —, admissibility in—Quinquennial papers prepared by revenue authorities under the provisions of Regulation 48 of 1793 ; See Possession, suit for                                                                                                                                                                    | 141 |
| —, admissibility in—Unregistered deed of gift of immovable property valuing more than Rs. 100, executed in 1882 ; See Adverse possession                                                                                                                                                                            | 432 |
| Evidence, admissibility of—Evidence Act (I of 1872), section 98—Evidence as to meaning of a term—Term ordinarily unambiguous—Extrinsic evidence of usage, if admissible—Improper rejection of evidence by trial Court—Appellate Court, duty of—Civil Procedure Code (Act V of 1908), O. 41, Rule 27(r) (a), 28, 29. |     |

**Evidence—(Contd.).**

Various words in written documents which *prima facie* present no ambiguity, may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject matter of the transaction, has been fixed, by parol testimony of the sense in which they were usually received.

Evidence is admissible to show that the term (সম) (*Sam*) did not signify the Bengali year which commences on the first day of Baisakh and ends on the last date of Chaitra but a different period specially applicable to *jalkar* tenancies as stated in the written statement.

The circumstance that evidence has been improperly excluded by the trial Court, does not justify a reversal of the decree made by that Court. The Code of Civil Procedure provides in order 41, rules 27(1) (a), 28, the method to be followed in a case of this description. It is open to the Judge of the appellate Court either to take the evidence himself or to direct the primary Court to take the evidence and to send it to the appellate Court for consideration. *Raja Jyot Kumar Mukherjee v. Jadu Nath Bose* ... 166

—, *admissibility of—Insolvent, admission of—Omission to object to reception of evidence, effect of—Evidence Act (I of 1872), section 154—Party called as witness by opposite party—Cross-examination—Hostile witness—Court's decision to rest on what.*

The admissions of an insolvent, if made after the act of insolvency, may be admissible against himself, but they cannot furnish evidence against another insolvent or as against the official assignee.

The erroneous omission to object to the reception of evidence, does not make it legally admissible in evidence.

A party when called by his opponent, cannot, as of right, be treated as hostile, the matter being solely in the discretion of the Court.

A witness who is unfavourable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court.

The Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. *Luchlram Motilal v. Radha Charan Poddar* ... 167

—, *admissibility of—Statements made to Police Officers—Corroboration.*

A and certain other persons committed dacoity at a certain place. A gave evidence in a proceeding under section 110 read with section 118 of the Code of Criminal Procedure to the effect that he had made over the stolen things of dacoity to the accused.

*Held*, that the evidence was admissible.

The evidence of Police officers with regard to statements made to them by certain persons is inadmissible.

Statement made to the investigating Police officer by a relative of a person

**Evidence—(Contd.).**

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| whose property was stolen, can be used to contradict or corroborate as the case may be, the statement made by him in the Court of the trying Magistrate. <i>Ashutosh Das v. King-Emperor</i> ... | 53       |
| —, reception of, erroneous omission to object to; <i>See</i> Evidence, admissibility of ...                                                                                                      | 107      |
| —, improperly excluded by trial Court—Civil Procedure Code, O. 41 Rr. 27(1) (a), 28, 29; <i>See</i> Evidence, admissibility of ...                                                               | 160      |
| —, in a proceeding under sections 110 and 118 of the Code of Criminal Procedure—Making over stolen things of dacoity; <i>See</i> Evidence, admissibility of ...                                  | 53       |
| —, of Police officers—Statements made by persons; <i>See</i> Evidence, admissibility of ...                                                                                                      | 53       |
| —, to be given that possession is unlawful; <i>See</i> Adverse possession ...                                                                                                                    | 432      |
| —, adduced—Improbability, nature of; <i>See</i> Will ...                                                                                                                                         | 373      |
| <b>Evidence Act, sections 68, 70—Document—Proof of execution—Execution admitted; <i>See</i> Attesting witness ...</b>                                                                            | 498      |
| —, section 73—Comparison of two documents; <i>See</i> Will ...                                                                                                                                   | 373      |
| —, section 73, scope of; <i>See</i> Will ...                                                                                                                                                     | 373      |
| —, section 83—Presumption of accuracy—Rennell's map referred to as evidence; <i>See</i> Possession, suit for ...                                                                                 | 205      |
| —, section 98—Evidence as to meaning of a term in document—Extrinsic evidence of usage—Term ordinarily unambiguous; <i>See</i> Evidence, admissibility of ...                                    | 160      |
| —, section 111—Person deriving benefit under deed—Confidential or fiduciary relation; <i>See</i> <i>Pardanashin lady</i> ...                                                                     | 529, 563 |
| —, section 154—Party called as witness by opposite party—Cross-examination; <i>See</i> Evidence, admissibility of ...                                                                            | 107      |
| <b>Evidentiary value of that map—Thak proceedings and decision of dispute took place in presence of predecessors of parties to suit; <i>See</i> Possession, suit for ...</b>                     | 465      |
| <b>Execution of deed by <i>pardanashin lady</i>—Fair transaction; <i>See</i> <i>Pardanashin lady</i> ...</b>                                                                                     | 529, 563 |
| —, of deed by <i>pardanashin lady</i> ; <i>See</i> <i>Pardanashin lady</i> ...                                                                                                                   | 529, 563 |
| —, of document, proof of, admitted—Attesting witness, if to be called—Evidence Act, sections 68, 70; <i>See</i> Attesting witness ...                                                            | 498      |
| —, purchaser, if can contest the reality or validity of the mortgage when attacked by the mortgagee; <i>See</i> <i>Pardanashin lady</i> ...                                                      | 333      |
| —, and attestation proved—Objection that witnesses might have been of better class; <i>See</i> Will ...                                                                                          | 373      |
| <b>Executors, several, powers of, if can be exercised by any one of them; <i>See</i> General grant ...</b>                                                                                       | 457      |
| <b>Fact, question of—Land if laid out could be disposed of to the best advantage to the owner; <i>See</i> Land acquisition ...</b>                                                               | 188      |
| <b>Family arrangement, when operative; <i>See</i> <i>Pardanashin lady</i> ...</b>                                                                                                                | 529      |
| —, arrangement made in settlement of a disputed or doubtful claim; <i>See</i> Family settlement ...                                                                                              | 323      |

## PAGE.

*Family settlement—Hindu widow in possession, executing a deed of relinquishment—Posthumous son, if bound—Transaction—Administration of justice.*

A, by his first wife left a daughter C, and by his second wife B, a daughter D. At the time of his death, B, C and D were living, B being pregnant. Difference arose after the death of A between B and C as to the title to properties which stood in the name of C, but which it was alleged by B, really formed part of the estate left by her husband and was held by C only as ostensible owner. Ultimately, sixteen days before the birth of E, the posthumous son and the plaintiff in the case, a deed of relinquishment was executed between B and C. E represented by D as next friend, brought a suit for declaration of his title to all the properties left by his father, A, and for recovery of possession with mesne profits.

*Held*, that E was not bound by the deed of relinquishment.

In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or like ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner.

The rights of the posthumous son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth.

The posthumous son is not bound by an alienation by his mother, of his paternal estate before his birth.

An unborn child, though treated as born, when it is for its benefit to be so considered, is not ordinarily regarded as born for the benefit of third persons.

The title of the posthumous son must be deemed to relate back to the time of death of his father.

It is of the utmost importance to the right administration of justice that the substance and the real meaning of the parties and not the form of expression and the literal sense of the transaction are to be constantly kept in view as the basis of the decision. *Kusum Kumari Dasi v. Dasarathi*

*Shaha* ... 323

Family settlement, deed of—Quantum of consideration; *See* *Pardanashin lady* 529

Fiduciary relationships in India—Duties; *See* *Partition* ... 56

Firm, not recognised as artificial of juristic person; *See* *Partnership* ... 405

Forfeiture, relief against—Decree passed on compromise—Jurisdiction of Court; *See* *Ejectment* ... 157

Form, defective—Assessment list not showing the income upon which the tax was assessed—Assessment, if invalid; *See* *Assessment* ... 283

Fraud—Parts of scheme early conceived and deliberately carried out, not proved; *See* *Pardanashin lady* ... 529

|                                                                                                                                                                                                                                                                                                                                          | PAGE. |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Fraud, allegation of, proof of ; See Pardanashin lady ...                                                                                                                                                                                                                                                                                | 329   |
| ——, proof of—Substitution of another kind ; See Pardanashin lady ...                                                                                                                                                                                                                                                                     | 329   |
| General grant— <i>Duration—Probate and Administration Act (V of 1881), Sections 50, 76, 82, 92—Judgment in rem—Several executors—Powers, if can be executed by some.</i>                                                                                                                                                                 |       |
| A general grant made in terms of section 76 of the Probate and Administration Act is operative under section 82 until the probate shall have been recalled or revoked on one or other of the grounds enumerated in section 50 in an appropriate proceedings instituted before a Court competent to exercise jurisdiction in that behalf. |       |
| Where a judgment operates as a judgment <i>in rem</i> (as the decision of a probate Court does under section 41 of the Indian Evidence Act) it is not subject to collateral attack ; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons, and all Courts            |       |
| Where there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any of them who has proved the will. <i>Rani Hemangini Debi v. Sarat Sundari Dehya</i> ...                                                                                                        | 457   |
| General grant made in terms of section 76 of the Probate and Administration Act, how long operative ; See General grant ...                                                                                                                                                                                                              | 457   |
| Gifts during <i>Maro-ul-maut</i> , effect of ; See Wakf ...                                                                                                                                                                                                                                                                              | 444   |
| Guardian— <i>Minor defendant—Certificated guardian, appointment of, without his consent—Certificated guardian, if to signify his consent—Civil Procedure Code (Act V of 1908), O 32, Rr. 3(1), 4(3)—Proposed guardian appealing against decree.</i>                                                                                      |       |
| Where the proposed guardian of a minor does not signify his consent, the Court should not, in contravention of the express direction of sub-rule (3) of rule 4 of order 32 of the Code of Civil Procedure, appoint him as guardian for the suit.                                                                                         |       |
| When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect.                                                                                                                                                                           |       |
| The provision as to the consent of the person proposed to be appointed guardian of the suit is mandatory and imperative.                                                                                                                                                                                                                 |       |
| It is obligatory on the Court under order 32 rule 3 (1) of the Code of Civil Procedure to appoint a proper person to be guardian of the minor defendant for the suit.                                                                                                                                                                    |       |
| Sub-rule (3) of rule 4 of order 32 of the Code of Civil Procedure controls both sub-rule (1) and sub-rule (2) and places a material restriction upon the power which the Court may exercise thereunder.                                                                                                                                  |       |
| Sub-rule (3) of rule 4 is applicable as well to cases under the sub-rule (1), as under sub-rule (2). No person who is competent to act as guardian of an infant either under sub-rule (1) or under sub-rule (2), shall be appointed guardian of the suit without his consent.                                                            |       |



## Guardian—(Contd.).

The appellant was an infant at the date of the institution of the suit. An application was made on behalf of the plaintiff that A who was appointed guardian of his person and property under the Guardians and Wards Act, might be appointed his guardian for the suit. Thereupon notices were issued upon the minor and the proposed guardian. The notices were reported to be duly served both upon the minor and his proposed guardian. There was no appearance, however, on behalf of the proposed guardian. The Court appointed the proposed guardian as guardian of the minor for the suit. At no stage of the suit, did the guardian appear and the result was that the suit was decreed *ex parte* against the infant described on the record as represented by the certificated guardian. Against this decree, the guardian on behalf of the infant preferred an appeal; the appeal was dismissed. The present appeal was preferred by the minor, who attained majority, after the decree in the appellate Court:

*Held*, that under the circumstances the fact that the proposed guardian appealed against the decree, did not amount to consenting to his appointment as guardian for the suit. *Annada Prosad Ghosh v. Upendra Nath Dey Sircar* ...

|                                                                                                                                                                              |     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| —Hindu husband, decease of; <i>See</i> Pardanashin lady ...                                                                                                                  | 293 |
| —, certificated, consent of, if necessary, for his appointment as guardian <i>ad litem</i> ; <i>See</i> Title, declaration of ...                                            | 302 |
| —, certificated, if to signify his consent before appointment as guardian <i>ad litem</i> ; <i>See</i> Guardian ...                                                          | 293 |
| —, certificated, not signifying his consent before appointment as guardian <i>ad litem</i> appealing against decree passed against minor, effect of; <i>See</i> Guardian ... | 293 |
| —proposed, should signify his consent—Minor; <i>See</i> Guardian ...                                                                                                         | 293 |
| —of Hindu widow; <i>See</i> Pardanashin lady ...                                                                                                                             | 329 |
| Hand sketches drawn up by parties on information derived from quinquennial papers and Hakikat Chauhaddi papers; <i>See</i> Possession, suit for ...                          | 141 |
| Handwriting, comparison of, proof of; <i>See</i> Will ...                                                                                                                    | 373 |
| Handwritings, proof of; <i>See</i> Will ...                                                                                                                                  | 373 |
| Hanafi law—Valid wakf, how created—Delivery of possession, if necessary; <i>See</i> Wakf ...                                                                                 | 444 |
| Hindu Law—Delivery of possession given under unregistered deed of gift of immovable property valuing more than Rs. 100; <i>See</i> Adverse possession ...                    | 432 |
| —widow, guardian of; <i>See</i> Pardanashin lady ...                                                                                                                         | 329 |
| History, previous, of Act, when can be resorted to—Uncertain or ambiguous; <i>See</i> Ejectment ...                                                                          | 233 |
| Hostile—Party called by his opponent as witness; <i>See</i> Evidence, admissibility of ...                                                                                   | 107 |
| —Unfavourable witness; <i>See</i> Evidence, admissibility of ...                                                                                                             | 107 |
| Improvement, valuable, co-tenant making in good faith, upon common property at his own expense; <i>See</i> Adverse possession ...                                            | 432 |
| Indian Arbitration Act, section 19, applicability of; <i>See</i> Suit, stay of ...                                                                                           | 173 |

**Interest power**—Application by surviving appellants to add as respondents legal representatives of the deceased co-appellant—Suit by a firm against another firm—Death of one of the members of the plaintiff firm—Application for substitution after time, rejected ; *See Partnership* ... 405

**Injunction, mandatory**—Roots of a sacred tree penetrating neighbour's land ; *See Mandatory injunction* ... 315

**Insolvent, admission of**, made after act of insolvency, if evidence against another insolvent ; *See Evidence, admissibility of* ... 107

—, admission of, made after act of insolvency, if evidence against himself ; *See Evidence, admissibility of* ... 107

—, admission of, made after act of insolvency, if evidence against official assignee ; *See Evidence, admissibility of* ... 107

**Intention to set apart property for charitable purposes**, if constitutes valid wakf ; *See Wakf* ... 444

**Interest**—Exorbitant rate ; *See Agricultural lease* ... 369

— on mesne profits—Discretion ; *See Mesne profits* ... 415

**Intermediate tenure**—*Zemindar's right to create*—*Concurrent lease*—*Lis pendens*—*Suit for specific performance of contract*—*Intermediate conveyance*.

If, after a lease has been granted, another lease of the same premises is granted, the term being concurrent with that of the existing lease, the concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue and afterwards to possession for the remainder, if any, of his own term, if the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term.

A zemindar or tenure-holder who has carved out a tenure or under-tenure as the case may be, is competent to interpose, between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant ; but he cannot prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred or limit its extent or restrain its operation.

When a suit for specific performance of a contract for transfer of immovable property is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based, and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. Such a suit operates as *lis pendens*. *Johar Mull Bhutia v. Jatindra Nath Bose* ... 79

**Intermediate tenure**—*Zemindar's right to create*—*Tenure between zemindari and putni*—*Suit for rents by Mitrashdar against putnidar*.

A zemindar can create a tenure between the zemindari and the putni which had already been created under it.

## Intermediate tenure—(Contd.).

|                                                                                                                                                                                                                                                                                                                                                                                                                   |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| A mirashdar between a zemindar and a putnidar can recover rent from the putnidar. <i>Nilambar Ghosh v. MIP Mohasanuddin</i> ...                                                                                                                                                                                                                                                                                   | 77  |
| — <i>Zemindar's right to create—Tenure between putni and durputni—Suit for rent by intermediate tenure-holder against durputnidar.</i>                                                                                                                                                                                                                                                                            |     |
| There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a putnidar and a durputnidar. It is immaterial what name is given to it.                                                                                                                                                                                                             |     |
| A suit lies at the instance of a tenure-holder intermediate between a putnidar and a durputnidar, being an assignee of rent, to recover rent from the durputnidar. <i>Madhu Sudan Saha Chandhuri v. Debendra Nath Sarkar</i> ...                                                                                                                                                                                  | 76  |
| Intermediate tenure, if can be created between putni and durputni; <i>See</i> Intermediate tenure ...                                                                                                                                                                                                                                                                                                             | 76  |
| — tenure, if can be created between zemindari and putni; <i>See</i> Intermediate tenure ...                                                                                                                                                                                                                                                                                                                       | 77  |
| — tenure-holder, if can sue for rent durputnidar—Tenure between putnidar and durputnidar; <i>See</i> Intermediate tenure ...                                                                                                                                                                                                                                                                                      | 76  |
| Interpretation of decree—Reference, if can be made to judgment and pleadings; <i>See</i> Mesne profits ...                                                                                                                                                                                                                                                                                                        | 415 |
| Joint family, manager of, when liable to account; <i>See</i> Partition ...                                                                                                                                                                                                                                                                                                                                        | 56  |
| — family property—Lands comprising emoluments of a Karnam in Madras; <i>See</i> Land law of Madras ...                                                                                                                                                                                                                                                                                                            | 16  |
| Judgment, statement in, as to admission—Litigant aggrieved—Procedure; <i>See</i> Title, declaration of ...                                                                                                                                                                                                                                                                                                        | 302 |
| —, statement in, as to admission, how to be refuted; <i>See</i> Title, declaration of ...                                                                                                                                                                                                                                                                                                                         | 302 |
| —, statement in, as to admission—Appellate Court; <i>See</i> Title, declaration of ...                                                                                                                                                                                                                                                                                                                            | 302 |
| Judgment in rem, effect of; <i>See</i> General grant ...                                                                                                                                                                                                                                                                                                                                                          | 457 |
| —, if subject to collateral attack; <i>See</i> General grant ...                                                                                                                                                                                                                                                                                                                                                  | 457 |
| Judgment of affirmance— <i>Civil Procedure Code (Act V 1908), Sec. 110—Variation of decree as to costs.</i>                                                                                                                                                                                                                                                                                                       |     |
| A party is not entitled to appeal to his Majesty in Council where the High Court varied the decision of the lower Court as to costs but dismissed the appeal on the merits in all material respects, as the judgment is one of affirmance, the value of the subject matter of the suit fulfilling the requirement of section 110 of the Code of Civil Procedure. <i>Chaitanya Charan Set v. Mohamed Yusuf</i> ... | 299 |
| Judicial order—Order according consent to withdrawal from prosecution—Criminal Procedure Code, Sec. 494; <i>See</i> Prosecution ...                                                                                                                                                                                                                                                                               | 51  |
| Jurisdiction— <i>Court-fees—Court-Fees Act (VIII of 1870), section 7 (X) (e)—Suits Valuation Act (VII of 1887), section 8.</i>                                                                                                                                                                                                                                                                                    |     |
| A suit for specific performance of a contract of lease, should be valued first for payment of court-fees in accordance with the rule embodied in section                                                                                                                                                                                                                                                          |     |

**Jurisdiction—(Contd.).**

7, sub-section (X) clause (c) of the Court-Fees Act. Then the value so determined should be adopted for purposes of jurisdiction.

The valuation for assessment of Court-fees controls the valuation for purposes of jurisdiction. *Sallendra Nath Mitra v. Ram Charan Pal* ... 94

**Jurisdiction—Criminal Procedure Code (Act V of 1898), Sec. 145—Final order based on no evidence, if valid.**

Where a final order under section 145 of the Code of Criminal Procedure was made by the trial Magistrate on the basis of a local enquiry of which there was no note or memorandum, and on the basis further of a judgment in a case under section 448 of the Indian Penal Code instituted on the complaint of a third person against some members of the second party:

*Held*, that the final order being based on no evidence, was bad and was set aside. *Gagan Howladar v. Karimaddi Chawkidar* ... 127

**—Criminal Procedure Code (Act V of 1898), section 145 (4)—Sufficient reason for decision**

The trial Magistrate in his final order in a proceeding under section 145 of the Code of Criminal Procedure, should set out reasons for his decision sufficient to enable the High Court to determine whether he has or has not complied with sub-section (4) of section 145. Without such statement it is impossible for the High Court to determine whether the Magistrate in making his final order has acted within or without his jurisdiction. *Bhuban Chandra Hazra v. Nilbaran Chandra Santra* ... 125

**—Criminal Procedure Code (Act V of 1898), section 531—Objection taken at an early stage—Prejudice—Misappropriation how probable.**

Where the petitioner was convicted under section 408 of the Indian Penal Code for an offence committed outside the territorial jurisdiction of the trying Court:

*Held*, that as the error did not occasion a failure of justice, the defect was cured under section 531 of the Code of Criminal Procedure. The fact that the objection of jurisdiction was taken at a comparatively early stage of the proceeding, was not conclusive proof that the accused was prejudiced by the irregularity.

The fact of misappropriation can be proved as well by circumstantial evidence as by direct evidence. *Kali Charan Kundu v. King-Emperor* ... 200

**Jury trial—Misdirection—Charge, essentials of—Reference to argument of defence pleader.**

In judging the charge to the jury one cannot say that there has been misdirection because every point in favour of the accused has not been put to the jury. The charge must be judged as a whole and one must see whether judging it as a whole, the case for the two sides had been fairly put, so that the jury can understand what they have to decide and come to a right conclusion.

It is not necessary for the Sessions Judge to repeat every thing that has

## Jury trial—(Contd.).

been said by the pleader for the defence in his speech. But he should draw the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence. A mere reference to the argument of the pleader is insufficient. *Harl. Charan Das v. King-Emperor* ... 512

Justice, administration of—Parties should be present when proof is led by either; *See Arbitration* ... 39

—, principles of—Arbitration conducted as legal arbitration; *See Arbitration* ... 39

—, principles of—Arbitration conducted as mercantile; *See Arbitration* ... 39

—, principles of—Minute observance of regularity of forms—Persons not familiar with legal procedure; *See Arbitration* ... 39

Kabuliat, construction of—"On any other ground"; *See Landlord and tenant* 119

— containing stipulation for rent to be paid for encroached land—Land, if to be annexed by tenant against the wishes of landlord; *See Tenant* ... 481

Karnam—Lands comprising emoluments, nature of—Joint family property; *See Landlaw of Madras* ... 16

—, appointment of, eligibility for; *See Land of Madras* ... 16

— lands, enfranchisement of—Enures for whose benefit; *See Landlaw of Madras* ... 16

— and Palayam lands, difference between; *See Landlaw of Madras* ... 16

Land, if to be annexed against the wishes of landlord—Kabuliat containing stipulation for rent to be paid for encroached land; *See Tenant* ... 481

—, submergence of—Reflooding seasonal and occurring for several months in each year; *See Possession, suit for* ... 465

— after submergence, right to; *See Possession, suit for* ... 141

Lands comprising emoluments of a Karnam in Madras, nature of; *See Landlaw of Madras* ... 16

— included in Permanent Settlement—Question of fact; *See Possession, suit for* ... 141

Land acquisition—Compensation—Market value—Adaptability for possible use—Particular in way—Question of fact.

The fairest and most favourable principle of compensation to the owners is to estimate the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it.

The tribunals assessing compensation must take into account, not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events it might within a reasonable period be applied, just as the owner might do if he were bargaining with a purchaser in the market.

*Per Buckland J*: Whether or not the particular in way in which compensation is claimed that the land if so laid out could be disposed of to the best advantage to the owner is one appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case. *Mohini Mohan Banerjee v. Secretary of State for India in Council*... 188

*Land-law of Madras—Service tenures—Karnam Lands, nature of title there-to—If the office-holder's family have any rights in such lands—Enfranchisement of Inams under Inam Rules of 1859—Whether it enures for the benefit of an office-holder's family or to himself exclusively—Distinction between personal or subsistence grants and service Inams—Madras Acts, II of 1894 and III of 1895—Madras Karnam Regulations of 1802, 1806, and 1831—Difference between the law of the Palayam and the law of the Karnam.*

The lands comprising the emoluments of a Karnam or village accountant in Madras are not joint family property. They are an appanage of the office, inalienable by the office-holder, and designed to be the emolument of the officer into whose hands soever, the office may pass. In many cases there may be a long continuance of the office in a particular family, but there is no absolute right of hereditary succession; the Karnam is a personal appointee, and if a stranger is appointed the lands go with the appointment to the stranger selected, without being subject to any claims thereon as a family right by relatives of former holders of the office.

This was the law in Madras even before Madras Act II of 1894 and Madras Act III of 1895, which make it clear that eligibility for the appointment of Karnam is a matter personal to the appointee.

When Karnam lands are enfranchised under the Inam Rules of 1859 the enfranchisement is to the office holder himself and does not enure for the benefit of his family.

In this respect Karnam lands, which are service Inams, differ from Palayam lands, which are now merely personal Inams. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar like an ordinary zemindari. But in the case of Karnams the lands follow the office. *Musti Venkata Jagannadha Sarma v. Musti Veerabhadra*

16

*Landlord, right of—Tenant encroaching upon the adjoining waste of his landlord; See Tenant*

481

*Landlord and tenant—Land Registration Act (VIII B C. of 1876), section 81—Bengal Tenancy Act (VIII of 1885), section 16—Purchaser from a tenure-holder—Kabuliati, construction of—"On any ground."*

The provisions of section 81 of the Land Registration Act are applicable to a case where one of the parties is a vendee of one of the contracting parties.

Section 16 of the Bengal Tenancy Act is a penal provision and should be strictly construed. It applies only to a person who claims the rent as a holder of the tenure, and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due.

A kabuliati contained the following: "You shall never be competent to enhance the said jama on any ground; nor shall we get abatement of the jama on the ground of diluvion or any other ground";

## Landlord and tenant—(Contd.).

*Held*, that the words "on any other ground" referred to cases of like nature as diluvion.

A person who has been deprived of possession of part of the demised premises should not be held liable for the whole rent for ever. This principle applies with greater force where the tenant is deprived of any portion of the leasehold property by any act on the part of the landlord himself.  
*Meabahnuddin Ahmed Chowdhury v. Abdul Borkat Ahmaddulla* ... 119

—————*Putni lease—Land, whether included in putni—Submergence—Entry in finally published record of rights—Incorrectness—Burden of proof—Bengal Tenancy Act (VIII of 1885), section 103 B Sub-section (3)—Tenant's acquisition of title to limited interest by adverse possession—Possession, nature of.*

The burden of proof lies *prima facie* upon the plaintiff to establish the incorrectness of the entry made in the finally published record of rights which must be presumed to be correct until proved by evidence to be incorrect under sub-section (3) of section 103 B of the Bengal Tenancy Act. But for this circumstance, it could not be presumed that because the defendants hold a putni taluk under the plaintiff, a particular tract in dispute was comprised within the tenure. But where evidence had been adduced by each of the contestants in support of their respective cases and the relevant facts were before the Court, the question of burden of proof was immaterial and importance should not be attached to the question on whom the initial *onus* lay.

The land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner.

The possession must be adequate in continuity in publicity, and in extent of area to take the title out of the true owner.

The possession required must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation. This is specially necessary in a case between landlord and tenant.

The tenant's possession of the lands encroached upon can commence to be adverse only where the title adverse to the landlord is asserted or the landlord becomes aware of the encroachment. This is essential to enable the tenant to acquire title to limited interest by adverse possession thereof.

*Jogendra Nath Saha Chaudhuri v. Maharaja Jagadindra Nath Ray Chaudhuri* ... 133

Land Registration Act, Sec. 81—One of the parties, a vendee of one of the contracting parties; *See* Landlord and tenant ... 119

Lease, concurrent, effect of—Reversion upon existing term; *See* Intermediate tenure ... 79

Lessee, concurrent, rights of; *See* Intermediate tenure ... 79

Letters Patent, Cl. (15)—Order in the exercise of revisional jurisdiction—Order if to be made, with jurisdiction; *See* Appeal ... 489

*License, refusal of—Licensed Ware-house and Fire brigade Act ( I. B. C. of 1893), sections 7, 15—Order to be passed by whom—Order passed by Vice Chairman, if legal—Delegation of power by Chairman—Bengal Municipal Act (III B. C. of 1884), section 45—Application not disposed of within thirty days, effect of.*

Refusal of an application for license to use any building or place as a warehouse should be by an order in writing under the hand of the Chairman of the Commissioner. Where such order was passed by the Vice-Chairman :

*Held*, that there was no refusal of the application under section 15 on the Licensed Warehouse and Fire-brigade Act.

A Chairman cannot by virtue of section 45 of the Bengal Municipal Act, delegate to the Vice-Chairman his power under the Licensed Warehouse and Fire-brigade Act.

Under section 7 of the Licensed ware-house and Fire-brigade Act, if the application is not disposed of within thirty days from the date of its being received by the Chairman, the applicant is exempted from liability so long as the application is not finally refused. *Superintendent and Remembrancer of Legal Affairs Bengal v. J. S. Mull* ... .. 203

*Licensed Ware-house and Firebrigade Act, section 7—Application not disposed of within thirty days, effect of ; See License, refusal of* ... .. 203

—, Secs, 7, 15—Order, passing of ; *See License, refusal of* ... .. 203

*Limitation—Adverse possession—Criminal Procedure Code, Sec. 146, attachment under ; See Title, declaration of* ... .. 302

—Adverse possession against purchaser at a Revenue Sale ; *See Possession, suit for* ... .. 141

—Cause of action, when accrues—Tenant encroaching upon the adjoining waste of his landlord—Landlord treating him as trespasser ; *See Tenant* ... .. 481

—Civil Procedure Code (Act V of 1908), Sec. 48—Time, when runs—Mortgage decree—Execution sale—Mortgagee not paid in full—Personal decree—Insolvency of judgment debtor—Application by mortgagee creditor to be entered in the list of scheduled creditors.

Where the mortgage decree directs that if the mortgage debt be not satisfied by the sale of the mortgaged properties, the balance be realised from the property and person of the mortgagor, the term of twelve years under section 48 of the Code of Civil Procedure runs from the date of the decree as fixed by order 20 rule 6 of the Code.

A debt barred by the statute of limitation is not provable in bankruptcy proceedings.

A debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy.

The bar of time ceases to run (or to further run) after adjudication—as the



**Limitation—(Contd.).**

effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditor, and all personal remedies against the bankrupt are also thereafter stayed.

On the 3rd October, 1907, the respondent obtained a decree against the appellant in a mortgage suit. The decree directed that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due to the plaintiff (i.e. the respondent) was not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the defendant (i. e. the appellant). The decree was executed and the hypothecated properties were sold, but a large sum was still due under the decree. On the 22nd June, 1918, the appellant made an application under section 6 of the Provincial Insolvency Act to be adjudged an insolvent. The adjudication order was made under section 16 (1) on the 4th April 1919. On the 21st May 1920, the respondent, as judgment creditor of the insolvent, applied under section 24 to have his name entered in the list of the scheduled creditors :

*Held*, that as when the adjudication order was made, the decree had not become barred by limitation, nor had the right thereunder become extinguished by the application of the rule contained in section 48 of the Code of Civil Procedure, the application of the respondent was not barred. *Baranashi Koer v. Bhabadeb Chatterjee* ... .. 167

—Criminal Procedure Code, Sec. 146, attachment under—Legal possession—Interruption ; *See* Title, declaration of ... .. 301

—Decree capable of execution ; *See*, Decree, execution of ... .. 397

—Facts to be proved—Issue to be raised ; *See* Possession, suit for ... .. 205

—*Limitation Act (IX of 1908), Sec. 15 (1)—Limitation, suspension of—Decree, execution of—Injunction—Res judicata—Limitation, plea of, not raised at proper stage.*

Sub-section (1) of section 15 of the Limitation Act contemplates the stay of execution of a decree either by injunction or by order ; an injunction to stay execution may be issued in a proceeding other than the execution proceedings, while an order for stay of execution may be made by the execution Court itself in the course of those proceedings.

Where a decree the execution whereof had been stayed, as regards one half share of one of the four properties by injunction, and as regards the remaining properties by an order of the execution Court itself :

*Held*, that the decree-holder was entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative.

When the judgment-debtor had notice of application for execution but omitted to object at the proper stage the order for the issue of the sale proclamation :

## Limitation—(Contd.).

*Held*, that the judgment-debtor was not competent, after the sale had taken place, to impugn its validity on the ground that the application for execution was barred by limitation at the time it was made. *Govlada Nath Chaudhuri v Basiruddin Mandal* ... .. 163

—Limitation Act (XV of 1877, Sch. II, Arts. 140, 142, 144—  
Rights strictly not of remainder man—Dispossession—Deed of doubtful  
import, construction of.

A deed of doubtful import is best construed by evidence of the conduct of the parties to it.

A died leaving him surviving a widow B and after giving her an authority to adopt a son or three sons in succession. In pursuance of the authority to adopt, B adopted C, but when the latter had attained the age of majority, disputes arose between them as to the management of the estate left by A. B sought to keep the management and control to the exclusion of C. These disputes were settled by an *ekrarnama* executed on the 6th September, 1865. C married the plaintiff D and on his death, without male issue in 1887, D as his widow became his heiress. The *ekrarnama* gave B power to possess and enjoy the property for life. C thereby withdrew all claim to possession of the property covered by the instrument except as to certain villages specified in it. B was to perform all acts of possession, to sue and be sued as owner during her life and to appropriate to her own use the profits, conditionally on her paying household and marriage expenses &c. C reserved the right to enter into possession only after her death and thereby created in himself the right of a remainder-man. But B had not the power of alienation, even of her life estate, and any accretions and accumulations made during her life time were not to go to her heirs or heiress of *stridhan* but to her son and his heirs.

B continued to be in possession in the same way as before A's death, till her death in 1900. D then took possession of the estate left by her father-in-law A and her husband C. During the lifetime of B, the defendants or their predecessors-in-title had taken possession of the disputed lands and their possession had lasted for more than 12 years before the institution of the present suit:

*Held*, that the *ekrarnama* merely intended to give the rights and impose the obligations of a Hindu widow, and to postpone the period of C's possession until B's death. The estate was not a life estate and C was not a remainder-man strictly so called. B's right to possession under the *ekrarnama* was also materially different from what right she had under the *verds* in the power of adoption.

Article 140 Sch. II of the Limitation Act was applicable and the plaintiff's suit was not time-barred. Articles 142 and 144 could not apply as the plaintiff (including any person or through whom the plaintiff derived her right to sue) was not dispossessed and the possession of the defendants did not become adverse to her until B's death.

## Limitation—(Contd.).

Article 140, Sch. I, of the Limitation Act, contemplates a suit by a remainder-man or reversioner, for possession of immovable property, when his estate falls into possession. *Promotho Nath Roy Chowdhuri v. Dinamanl*

*Choudhuranl* ... ..

129

— *Limitation Act (IX of 1908), Schedule I, Arts. 62, 109, 120—Suit by one co-sharer landlord against another for share of rent collected.*

Article 120, and not articles 62 and 109, schedule I of the Limitation Act is applicable to a suit by a co-sharer landlord against another for a share of the rent collected in the supposed right by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly.

*Bhubaneswar Bhattacharjee v. Dwarkeswar Bhattacharjee* ... ..

508

— *Rent decree—Acknowledgment—Bengal Tenancy Act (VIII of 1885), Secs. 184, 185, Sch. III, Art. 6—Limitation Act (IX of 1908), Sec. 19.*

Section 19 of the Limitation Act is applicable to a decree for rent valued less than Rs. 500, and hence an acknowledgment of liability made by a judgment-debtor in respect of the decree-holder's right to execute the decree, gives the decree-holder a fresh starting point for counting the period of limitation prescribed by article 6, schedule III of the Bengal Tenancy Act.

Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been made, that the instalment for *Pous* remained unpaid but as it had not become due, the decree-holder could not proceed with the execution ;

*Held*, that was a sufficient acknowledgment within the meaning of section 19 of the Limitation Act. *Parash Nath Pal Choudhury v. Ismail Sardar* ...

195

Limitation, plea of—Bar under special law ; *See* Possession, suit for ...

205

—, plea of, raising of, in appeal ; *See* Possession, suit for ...

205

—, statutes of, construction of—Importation of words ; *See* Possession, suit for ...

465

—, when to be decided against parties ; *See* Possession, suit for ...

205

—, running of—Payment of mesne profits—Date of ultimate decree ; *See* Mesne profits ...

415

Limitation Act, Sec. 15(1)—Execution of decree, stay of ; *See* Limitation ...

163

—, Sec. 19—Acknowledgment—Rent decree, execution of—Time, if extended ; *See* Limitation ...

195

—, Sch. I, Art. 46—Order under section 40(1) of the Bengal Survey Act ; *See* Possession, suit for ...

465

—, Sch. I, Art. 91—Suit for possession and partition upon declaration—Void instrument ; *See* *Pardanashin lady* ...

563

—, Sch. I, Art. 120—Suit by a co-sharer landlord against another for a share of rent collected ; *See* Limitation ...

508

—, Sch. I, Arts. 140, 142, 144—*Ekranaama*—Possession after determination of limited or particular estate ; *See* Possession, suit for ...

141

—, Sch. I, Arts. 142, 144, applicability of ; *See* Possession, suit for ...

141

|                                                                                        | PAGE |
|----------------------------------------------------------------------------------------|------|
| Limitation Act, Sch. I, Art. 182—Decree absolute, incapable of execution—              |      |
| Decree, amendment of—Time, when runs; <i>See</i> Decree, execution of ...              | 397  |
| —, Sch. II, Art. 140—Estate not strictly life estate—Estate, pos-                      |      |
| session of, postponed; <i>See</i> Limitation ...                                       | 129  |
| —, Sch. II, Art. 142, applicability of; <i>See</i> Limitation ...                      | 129  |
| —, Sch. II, Art. 144, applicability of; <i>See</i> Limitation ...                      | 129  |
| Limited estate holder, adverse possession against; <i>See</i> Possession, suit for ... | 141  |
| — interest—Adverse possession; <i>See</i> Landlord and tenant ...                      | 133  |
| <i>Lis pendens—Mortgage suit.</i>                                                      |      |
| Misdescription of property involved in a litigation is sufficient to render the        |      |
| doctrine of <i>Lis pendens</i> applicable in the case of a person having know-         |      |
| ledge or notice of the true state of things                                            |      |
| In the case of a mortgage suit the <i>lis pendens</i> does not terminate till the      |      |
| security has been realised for the satisfaction of the judgment debt. <i>Bepin</i>     |      |
| <i>Krishna Roy v. Jogeshwar Roy</i> ...                                                | 256  |
| <i>Lis pendens—Suit for specific performance of contract for transfer of immovable</i> |      |
| property—Final decree transferring title—Intermediate conveyance; <i>See</i>           |      |
| Intermediate tenure ...                                                                | 79   |
| <i>Lis pendens—Transfer of Property Act (IV of 1882), Sec. 51—Contentious</i>          |      |
| <i>suit—Consent decree.</i>                                                            |      |
| In order to determine whether a suit is contentious within the meaning of              |      |
| section 52 of the Transfer of Property Act, one has to consider whether                |      |
| it is contentious in its origin and nature: A consent decree falls within              |      |
| the scope of the rule of <i>lis pendens</i> .                                          |      |
| A decree is none the less a decree as defined by the Code of Civil Procedure,          |      |
| because it is based on a compromise, and the legal effects of the decree               |      |
| contemplated by order 23, rule 3 of the Code of Civil Procedure, do not                |      |
| differ from the legal effects of a decree where the suit has been fought to            |      |
| the end. When the Court makes a decree by consent, it performs not a                   |      |
| ministerial but a judicial function; the Court must be satisfied that the              |      |
| agreement or compromise is lawful, and although the Court must record                  |      |
| the entire agreement or compromise, it can pass a decree in accordance                 |      |
| therewith only in so far as it relates to the suit. Consequently, the fact             |      |
| that a decree is given in accordance with terms which have been come to                |      |
| between the parties, does not prevent the decree from being the formal                 |      |
| expression by the Court of an adjudication on a right claimed or a                     |      |
| defence set up, conclusively determining the rights of the parties with re-            |      |
| gard to all or any of the matters in controversy in the suit, within the               |      |
| meaning of the definition contained in section 2(2) of the Code of Civil               |      |
| Procedure. <i>Bharat Ramanuja Das Mahant v. Sarat Kamini Das</i> ...                   | 96   |
| Madras Regulation XXV of 1802, scope of; <i>See</i> Palayams ...                       | 6    |
| Manager of Court of Wards, power of, to sue—Bengal Tenancy Act, Sec. 97—               |      |
| Estate coming under Court of Wards under section 95(a) of the Bengal                   |      |
| Tenancy Act; <i>See</i> Possession, suit for ...                                       | 205  |
| — of joint family, when liable to account; <i>See</i> Partition ...                    | 56   |
| Mandatory—Provision of Civil Procedure Code, O. 32, R. 4 Sub-R (3); <i>See</i>         |      |
| Guardian ...                                                                           | 293  |

**Mandatory injunction—Specific Relief Act (I of 1877), Secs. 54, 55—Roots of tree penetrating neighbour's land—Sacred tree—Obligation.**

As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance, under section 55 of the Specific Relief Act.

Obligation may be taken to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances; but in order that it may be enforced by a Court, it must be a legal obligation, and not merely moral, social or religious.

Refusal to grant a perpetual injunction to the plaintiffs to restrain the execution of a decree for the removal of a *nim* tree obtained by defendant No. 1 against defendant No. 2, on the ground that the tree is a sacred one, duly consecrated and worshipped by orthodox Hindu people of the locality and that its removal would be an invasion of their religion and would offend their religious sentiments, will not lead to a breach of an obligation that is, of a duty enforceable by law which the plaintiffs could compel the defendant to perform, within the meaning of section 54 of the Specific Relief Act. *Bhudeb Mookerjee v. Kalachand Mallik* ... 315

*Malz-ul-maut*, existence of, conditions for; *See Wakf* ... 444

—————, particular illness, if constitutes—*Fact*; *See Wakf* ... 444

Material change of instrument, what is; *See Pardanashin lady* ... 333

**Meane profits—Decree, interpretation of—Order, validity of, questioning—Elements for determination in assessment of meane profits—Revenue sale auction-purchaser—Estate, nature of, taken—Adverse possessor—Civil Procedure Code (Act XIV of 1882), Sec 211—Decree—Time for payment, running of—interest—Bona fide and mala fide trespassers.**

Reference may legitimately be made to the judgment in the suit, and, if need be, to the pleadings, to interpret the decree.

The validity of an order made at one stage of a litigation, unless forthwith challenged by an appropriate proceeding in a superior tribunal, is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage.

The annual income, the period of time and the rate of interest are the elements which should be determined before the actual amount of meane profits can be assessed.

A purchase at a sale for arrears of revenue does not derive his title from the defaulting proprietor but takes the estate from the Crown as it stood at the time of its inception as a permanently settled estate.

A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor is bound to surrender posses-

**Mesne profits—(Contd.).**

sion of that land to the revenue sale purchaser when the sale is confirmed, and, if not so surrendered, is liable for mesne profits, as he unlawfully keeps the purchaser out of possession.

For the purpose of interpreting section 211 of the Code of Civil Procedure of 1882, the term 'decree' means the decree of the final Court.

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously.

The balance of judicial opinion is in favour of the view that when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree.

The period of three years for payment of mesne profits should be calculated from the date of the ultimate decree which is the only decree capable of, and brought in, execution.

In no case can the plaintiff claim mesne profits for any period subsequent to an offer by the defendant to restore him possession.

Interest should ordinarily be allowed on mesne profits, though, inasmuch as the interest forms an integral part of mesne profits, the interest is as much in the discretion of the Court as the mesne profits themselves.

All trespassers, whether *bona fide* or *mala fide*, are liable for mesne profits; the *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser.

Raja Sashikanta Acharyya v. Raja Sarat Chandra Rai Chaudhuri ...

415

Mesne profits, assessment of, principle of—Elements, necessary to be determined; *See* Mesne profits ...

415

— profits, if plaintiff can claim subsequent to an offer by defendant to restore him possession; *See* Mesne profits ...

415

Minor, if represented—Guardian appointed without his consent—Decree, effect of; *See* Guardian ...

293

Mirasdar between zemindar and putnidar, if can recover rent from putnidar;

*See* Intermediate tenure ...

77

Misappropriation, how proved; *See* Jurisdiction ...

200

Misconduct vitiating award—Irregularities in procedure—No proper hearing of matters in dispute; *See* Arbitration ...

39

Misdescription—Defendant described as minor—Guardian *ad litem* appointed—Subsequent suit by defendant, if maintainable; *See* Title, declaration

of ...

302

|                                                                                                                                                                                                                                                                                                                                                                               | PAGE. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Misdescription—of property in dispute, effect of ; <i>See Lis pendens</i> ...                                                                                                                                                                                                                                                                                                 | 256   |
| ————— to jury what is ; <i>See</i> Jury trial ...                                                                                                                                                                                                                                                                                                                             | 512   |
| Mistake, mutual, effect of—Mortgage deed—Mistake reproduced in decree—                                                                                                                                                                                                                                                                                                        |       |
| Decree not resulting in sale in execution ; <i>See</i> Rectification ...                                                                                                                                                                                                                                                                                                      | 256   |
| ————, unilateral, effect of ; <i>See</i> Rectification ...                                                                                                                                                                                                                                                                                                                    | 256   |
| Mortgage bond—Burden of proof—Recital as to payment of consideration money—Stranger to bond denying execution as well as payment of consideration money ; <i>See</i> Pardanashin lady ...                                                                                                                                                                                     | 333   |
| ———— bond—Recital as to payment of consideration money—Execution admitted by or proved against, mortgagor—Burden of proof ; <i>See</i> Pardashin lady ...                                                                                                                                                                                                                     | 323   |
| ———— deed—Mutual mistake—Mistake reproduced in decree—Decree not resulting in sale in execution ; <i>See</i> Rectification ...                                                                                                                                                                                                                                                | 256   |
| ———— suit— <i>Lis pendens</i> , continuance of ; <i>See Lis pendens</i> ...                                                                                                                                                                                                                                                                                                   | 256   |
| ———— notified turning out to be invalid—Benefit, who gets—Judgment-debtor, if can claim the amount alleged to have been due on the mortgage ; <i>See</i> Pardashin lady ...                                                                                                                                                                                                   | 333   |
| Mortgagee, rights of—Decree for sale—Form of decree altered by consent at the instance of mortgagor—Central Provinces Tenancy Act, Sec. 42 ; <i>See</i> Estoppel ...                                                                                                                                                                                                          | 1     |
| Mother, if entitled to a share—Partition between the sons and the purchaser of the interest of one or more of the sons ; <i>See</i> Partition ...                                                                                                                                                                                                                             | 29    |
| Mother's share—Partition between sons and the purchaser of the interest of one or more of the sons—Stridhan—Stridhan received from father ; <i>See</i> Partition ...                                                                                                                                                                                                          | 29    |
| Murder— <i>Penal Code (Act XLV of 1860), section 299, explanation—Person suffering from injury—Not fatal to ordinary men.</i>                                                                                                                                                                                                                                                 |       |
| If a person was suffering from an injury which would render injuries (which would not have a fatal effect to one ordinary man) fatal to that person, it does not necessarily follow, as it would in the case of a healthy man that the person inflicting those injuries knew it to be likely that death would be caused thereby. <i>Alauddi Chowkddar v. King-Emperor</i> ... | 515   |
| Negotiations antecedent to execution of mortgage instrument ; <i>See</i> Oral evidence, admissibility of ...                                                                                                                                                                                                                                                                  | 256   |
| Notice, effect of—Knowledge ; <i>See</i> Notice ...                                                                                                                                                                                                                                                                                                                           | 256   |
| ————, if knowledge ; <i>See</i> Notice ...                                                                                                                                                                                                                                                                                                                                    | 256   |
| ————, legal conception of, when not required ; <i>See</i> Notice ...                                                                                                                                                                                                                                                                                                          | 256   |
| Notice— <i>Notice to purchaser by title deed.</i>                                                                                                                                                                                                                                                                                                                             |       |

The conception of notice was introduced in law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge ; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is therefore in its essential nature inferior to knowledge.

## Notice—(Contd.).

Whenever a party has obtained a full knowledge although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as a substitute has been more accurately accomplished in another manner.

If the party has in any way obtained the full knowledge, those same results must be necessarily and even in a higher degree, be attributed to the very substance itself—which are, from motives of general policy, attributed to notice as its representative and substitute.

Notice to a purchaser by his title papers in one transaction, will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. *Bepin Krishna Ray v. Jogeshwar Ray* ... 256

Notice, policy of; *See* Notice ... 256

—Presidency Towns Insolvency Act (III of 1909), Secs. 13, 18—Omission to serve notice—Irregularity—Waiver—Burden of proof.

Omission to serve the notice contemplated by sub-section 3 of section 13 of the Presidency Towns Insolvency Act is not a formal defect or irregularity within the meaning of section 118.

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him.

The burden lies upon the creditor to establish that the insolvent has waived the omission to serve the notice. *Nathumull v. Goneshmull Jivanmull* ... 349

Notice and knowledge, difference between; *See* Notice ... 256

—to be stuck up in the Collector's cutchery, contents of; *See* Putni sale 399

—to purchaser by title deed, effect of; *See* Notice ... 256

Omission to object execution of decree at proper stage, effect of; *See* Limitation ... 163

## Oral evidence, admissibility of—Negotiation, antecedent.

Oral evidence is admissible as to negotiations antecedent to the execution of the mortgage instrument, showing what was intended to be offered and accepted as security was a certain ancestral share of the mortgagor in the original estate which at the time of the mortgage was part of the separate account. *Bepin Krishna Roy v. Jogeshwar Ray* ... 256

Order, judicial—Order according consent to withdrawal from prosecution—Criminal Procedure Code, Sec. 494; *See* Prosecution ... 51

—, legality of—Order under section 144 of the Code of Criminal Procedure Act V of 1898—Penal Code (Act XLV of 1860), Sec. 188.

An application for revision against an order passed under section 144 of the



**Order—(Contd.).**

Code of Criminal Procedure was rejected by the High Court on the ground that at the time it was made the period of the order had elapsed and it was stated when the order was passed that the question of the legality of the order could be raised at the trial of the petitioners should they be prosecuted under section 188 of the Indian Penal Code. The petitioners were prosecuted under section 188.

*Held*, that the legality of the order under section 144 of the Code of Criminal Procedure could be questioned in proceedings under section 188 of the Indian Penal Code. *Jiaratdin Mohammed v. King-Emperor* ... 578

—, when conclusive; *See* Mesne profits ... 415

— in execution of a Small Cause Court decree passed by Small Cause Court; *See* Appeal ... 477

— in execution of decree passed by Small Cause Court, transferred to ordinary Court; *See* Appeal ... 477

— passed by Vice-Chairman of Municipality, refusing license to use any building or place as ware-house, if valid; *See* License, refusal of ... 203

— under section 144 of the Code of Criminal Procedure, if can be questioned in proceedings under section 188 of the Penal Code; *See* Order, legality of ... 578

**Oudh taluqdars—Primogeniture sanads—Construction—"Successors" meaning of—Limited to succession ab intestate—Oudh Estates Act (1 of 1869).**

The ordinary form of sanad granted to the Oudh taluqdars provides that in the event of the grantee or any of his successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture.

*Held*, that "successors" in this connection is equivalent to heirs, is confined to those who succeed to the estate by virtue of the grant, and does not include those who take the whole or part thereof through alienation.

*Ghulam Abbas Khan v. Musammat Amatul Fatima* ... 113

**Ouster—Non-participation in the profits by one co-sharer—Exclusive occupation; *See* Adverse possession ... 432**

—, evidence of—Erection of substantial building on joint property by one co-owner; *See* Adverse possession ... 432

**Palayams in the Southern Districts of Madras—Their nature—If they are alienable—Military service tenures—Abolition of such tenures by proclamation—Police service tenure—Madras Regulation XXV of 1802.**

In the Southern Districts of Madras sundry palayams were originally held on military service tenure and subject to the payment of a tribute to the paramount power. But these military service tenures were abolished and determined by a Proclamation of the Governor in Council dated 1st December 1801, and thereafter any character of inalienability attaching to the palayams by virtue of such tenure ceased.

Police Service tenures were abolished in 1816 by the Government of Madras:

## Palayams—(Contd.).

but it was held in the present case that it was not proved that the palayam had in fact been held on such a tenure.

Madras Regulation XXV of 1802 neither gives to nor takes away from the former owners of lands not permanently settled any rights which they then had. *Malayandi Appayasami Naicker v. The Midnapur Zemindari Co. Ltd.* ... .. 6

Palayams in the Southern Districts of Madras, if alienable; *See Palayams* ... 6

—In the Southern Districts of Madras, nature of; *See Palayams* ... 6

*Pardannashin lady—Deed, execution of—Evidence Act (I of 1872), Sec. 110—good faith—Burden of proof—Person deriving benefit under a deed—Independent and competent advice—Joint property—Nucleus—Separate estate—Limitation Act (IX of 1908), Sch. I Art 91—Account.*

The Court, when called upon to deal with a deed executed by a *pardannashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. These principles fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test.

The Court should have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

There is a grave risk of failure of justice, if these general principles are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction.

Where there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party

• **Pardanashin lady—(Contd.)**

who is in a position of active confidence. Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instruments as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage.

There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original rights, for equity demands in such circumstances the most abundant good faith in the transaction between the parties.

Where the family was joint and there was a nucleus of joint property, the burden lies on the party setting up a case of separate estate.

Article 91 of schedule I of the Limitation Act has no application to a case where a suit is brought for possession and partition upon declaration that an instrument under which the defendant claims is void.

The burden lies upon the defendant who obtained the deed by misrepresentation, to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *karta* is liable is as to the existing state of the property divisible; the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. But the *karta* is the accountable party, and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property now consists of, not what the *karta* says it is. *Nibaran Chandra Mookerjee v Nirupama Debi* ... ..

563

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—*Deed, execution of—Independent legal advice—Person standing in a fiduciary character—Absolute stranger—Burden of proof—Evidence adduced on both sides—Family settlement, when operative—Pleading—Fraud—Variance between pleading and proof—Guardian of Hindu widow.*

The Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. These principles will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases

*Pardanashin lady—(Contd.).*

where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class or cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test.

Independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction.

It is not an inflexible rule that a *pardanashin* lady must have independent legal advice.

The Court should have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

There is a grave risk of failure of justice, if these general principles are moulded into inelastic formulas or crystalised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Where there is a question of good faith of a transaction between the parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage.

If a confidence is reposed and that confidence is abused, Courts of equity will grant relief. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original rights, for equity demands in such circumstances the most abundant good faith in the transaction between the parties.

To secure a fair transaction, a full appreciation by the lady of the value and nature of her rights is essential.

The question is one of substance and not merely one of burden of proof, and where evidence has been adduced by both the contestants in support of their respective cases and the relevant facts are before the Court, the

**Pardanashin Lady—(Contd.).**

question of burden of proof is immaterial and importance should not be attached to the question on whom the initial onus lay.

It is not necessary to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the compromise should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed.

The absence of advice would not have by itself necessarily vitiated the transaction, if it had been otherwise established to be righteous, that is, such as a right-minded person might be expected to do.

To make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection; one side must not know more about the matter than the other, unless what he knows could not possibly have affected the other party's decision.

A family arrangement to be operative must be without fraud; it will not be supported if founded on mistake of either party to which the opposite party was an accessory; or if either party has been misled by the concealment of material things; for the essence of the matter is mutual communication of all relevant circumstances.

The Court should not scan with nicety the quantum of consideration in a deed of family settlement.

When a Hindu husband is deceased, his kin is the guardian of his childless widow; it is only when the husband's family becomes extinct or contains no male or is helpless, that the heirs of her own father are entitled to be her guardians.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

A charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

Every variance between pleading and proof is not fatal; the Court must carefully consider whether the objection is one of form or of substance. The rule that the allegations and the proof must correspond, is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations.

A Court can order amendment of a plaint to do that substantial justice between the parties for which alone it exists.

**Pardanashin Lady—(Contd.).**

When a case is based on fraud, the fraud must be proved, and no relief can be given in the suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit.

Per Buckland, J.: In a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and even should the Court find that fraud was practised, if such fraud is other than the fraud alleged, the defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man or where a *pardanashin* lady is not concerned. But where a *pardanashin* lady is involved, other and equally well-known rules have to be applied and conformity with them has to be established.

A *pardanashin* lady must have advice, that the advisor should have no adverse interest, and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary, contrasting them with her rights; if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential. *Satish Chandra Ghose v. Kalidasi Dasi*

529

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*—Mortgage deed—Execution of—Recital as to payment of consideration—Stranger to deed—Burden of proof—Burden of proof, question as to, when arises—Mortgage notified turns out to be invalid—Mortgage accrues in whose favour—Consideration not paid in full—Bond, validity of, if affected—Deed executed by purdanashin lady—Principle—Document, alteration in, after execution, when material—Immaterial alteration—Court's decision to rest on what.*

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him the *onus* lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue. When the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case.

The question of *onus* of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof becomes immaterial, and importance should not be attached to the question on whom the initial *onus* lay.

The validity of a bond is not affected by the fact that the consideration recited was not paid in full, the bond is operative to the extent of the sum actually advanced.

**Purdanashin Lady—(Contd.).**

Either party to a document may show that that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed.

If the mortgage notified turns out to be invalid, the benefit is taken by the purchaser, and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage; and the purchaser is free to contest the reality or validity of the mortgage when he is attacked by the mortgagee.

The Court when called upon, to deal with a deed executed by a *purdanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and, thirdly, that she had independent and disinterested advice in the matter.

On examination of judicial decisions on the point, they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test.

The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have possessed a capacity to judge for herself.

These are only general principles, and it cannot be too strongly emphasized that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

An alteration in a document after its execution and registration made in good faith to carry out the original intention of the parties, does not vitiate the instrument.

A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. Accordingly any act which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technically an alteration. It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual

**Pardanashin Lady—(Contd.).**

alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract; it must also be in a material part of the instrument and must affect the rights and obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original.

What alteration is immaterial depends upon the nature of the instrument as also upon the nature of the change.

Though there may be ground for suspicion, though the conduct of the parties may engender doubt, the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony. *Krishna Kisor De v. Nogendra Bala Chowdhurani* ...

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|--------------------------------------------------------------------------------------------------------------------|-----|
| <i>De v. Nogendra Bala Chowdhurani</i> ...                                                                         | 333 |
| — if to have independent legal advice; <i>See</i> <i>Pardanashin lady</i> ...                                      | 529 |
| <b>Parties to be present</b> —Experimental test; <i>See</i> <i>Arbitration</i> ...                                 | 39  |
| — to be present—Inspection; <i>See</i> <i>Arbitration</i> ...                                                      | 39  |
| — to be present when proof is led by either; <i>See</i> <i>Arbitration</i> ...                                     | 39  |
| <b>Partition</b> —Minors; <i>See</i> <i>Family settlement</i> ...                                                  | 321 |
| — <i>Purchaser of son's share—Mother, if entitled to a share—Stridhan received from father, if to be deducted.</i> |     |

Though a Hindu mother cannot compel a partition so long as the sons remain united, if a partition does take place between the sons, she is entitled to a share equal to that of a son in the coparcenary property, and she is entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them. If the mother has received *stridhan* from her husband or father-in-law, its value should be deducted from the share received on partition; but the *stridhan* received from the father of the lady should not be deducted.

A member of the family cannot by alienation of his interest, prejudice the position of another member, because no owner of property is competent, as a general rule, to convey to any person a higher right than what he himself possesses. *Jogobondhu Pal v. Rajendra Nath Chatterjee* ...

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| — <i>Sudras in Madras—Adopted son and after born son—Hindu Law—Decision resting on discretion—Fiduciary relationships in India—English trustee—Dattaka Chandrika, its authority.</i> | 29 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|

The rules applicable to accounts between trustees and *cestui que trusts* in England do not invariably apply in their entirety to fiduciary relationship in India: *e. g.* to the case of a manager of a joint family, who, except where direct misappropriation is proved or fraudulent and improper conversion of the moneys to his personal use, is liable to account only for what he has actually received and not for what he ought to or might have received, if the moneys had been profitably dealt with.

There are fiduciary relationships in India which do not involve all the duties which are imposed upon trustees in England.

Among *Sudras* in Madras the adopted son shares equally with the subse-



## Partition—(Contd.).

quently born *Aurasa* son. The rule to that effect first propounded in the *Dattaka Chandrika* has been accepted and acted upon by the Hindus in Madras for over a century, and may now be regarded as established law. The *Dattaka Chandrika* has been long accepted in Southern India as a high authority on the law of adoption, but where its propositions are not based upon authentic texts it is necessary to enquire whether they have in fact been accepted and acted upon as law.

It requires very special and unusual circumstances to induce the Privy Council to vary a decision resting on discretion, even though the view of the first appellate Court differed from that of the primary Court as to the way in which that discretion should be exercised. *Arunilal Perrazu v. Arunilal Subbarayudu* ... .. 36

— between sons and the purchaser of the interest of one or more of the sons—Stridhan received from father; *See* Partition ... .. 29

— between the sons and the purchasers of the interest of one or more of the sons—Mother, if entitled to a share; *See* Partition ... .. 29

Partner, without the consent of other partners, carrying on business of the same nature as and competing with that of the firm; *See* Partnership ... 403

Partnership—*Improperly constituted appeal—Civil Procedure Code (Act V of 1908), O. 30, suit under—Names of partners, disclosed—Death of one of the partners—Legal representatives, application by, for substitution—Application barred by limitation—Limitation Act (IX of 1908), Sch. I, Art. 176—Partners, other, application by, to make them co-respondents—Inherent power—Account, reopening of—Partnership, dissolution of—No fixed term agreed upon for dissolution—Presumption—Continuance of partnership—Accounts—Scope and extent—Partner carrying on business of same nature and competing with that of firm, liability of—Contract Act (IX of 1872), section 257—Notice—Evidence Act (I of 1872), Secs. 66, 114 Illus. (g), 164.*

A suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or, in the event of his death *pendenti lite*, in the absence of his legal representatives:

When an appeal has abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear, this depends upon the nature and scope of the suit:

A suit contemplated by order 30 of the Code of Civil Procedure may be brought by or against a firm in the firm name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the date of dissolution. This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person. The proceedings in a suit so brought continues in the name of the firm, even though the names of the partners are disclosed: Order 30 rule 2 of the Code of Civil Procedure.

In the plaint although the suit was described as a suit by a firm against

*Partnership—(Contd.).*

three other firms, the names of the members of the firms were disclosed. During the pendency of the appeal, one of the members of the plaintiff firm died on the 20th June 1920. On the 3rd January, 1921, the three sons of the deceased applied under order 30 rule 4 (2) of the Code of Civil Procedure, as his legal representatives to be added as parties appellants. This application was dismissed on the 21st June, 1921, under article 176, schedule I of the Limitation Act. Three days later, the surviving appellants applied to the Court to add as respondents to the appeal the legal representatives of the deceased co-appellant, who had, through their remissness, failed to join as appellants within the prescribed time :

*Held*, that the Court had under the circumstances, inherent power to add a respondent to the appeal.

An account once taken in the presence of the parties interested and acquiesced in by them will not be lightly re-opened.

Where no fixed term has been agreed upon for the duration of a partnership any partner may determine the partnership at any time or giving notice of his intention so to do to all the other partners. But the dissolution takes place as from the date of the communication of the notice

Where persons who intended to retire from the partnership business did continue to take things from the business and to associate otherwise with its work, a presumption may be drawn in favour of the continuance of the partnership.

The accounts in a suit for recovery of money due on adjudication of accounts upon dissolution of a partnership business, have to be taken for the benefit of all the persons concerned, the scope and extent of such accounts must be determined by the Court on the true state of facts disclosed in the evidence and cannot be restricted to the limited measure of relief claimed by the plaintiff on inaccurate allegations.

If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby. The rule is not applicable to a really different business, though the same knowledge and information may be useful in both.

Section 257 of the Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion, in certain cases, however, arises after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the pre-

**Partnership—(Contd.).**

sumption recognised in illustration (g) to section 114 of the Evidence Act may be applied, namely, that evidence which could be and is not produced has been withheld because if produced it would be unfavourable to the person who withholds it. In such circumstances, secondary evidence will become admissible, and the party who has withheld the documents will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Evidence Act. *Pulla Behari Roy v. Mahendra*

*Chandra Ghoshal* ... .. 407

—, continuance of—Intention to retire from partnership business—

Continuing to take things from partnership business and associating otherwise with its work; *See* Partnership ... .. 405

—, dissolution of—No fixed term agreed upon for the duration of partnership; *See* Partnership ... .. 405

—, dissolution of, how and when take place—No fixed term agreed upon for the duration of partnership; *See* Partnership ... .. 405

—, how dissolved—No fixed term agreed upon for the duration of partnership; *See* Partnership ... .. 405

**Party**—Suit to take accounts and wind up the affairs of a partnership; *See* Partnership ... .. 405

—, if can appeal against a decree in his favour, solely for the purpose of attacking the grounds assigned in the judgment in support of that decree; *See* Appeal ... .. 489

— obtaining full knowledge; *See* Notice ... .. 265

— dismissed from record, if can appeal; *See* Appeal, right of ... .. 475

— to a bond, if can show non-payment of consideration, though payment recited; *See* Pardanashin lady ... .. 333

— to a bond, if can show that the consideration was in reality different from what was stated in the deed; *See* Pardanashin lady ... .. 333

**Penal Code, Sec. 299, Explanation**—Person suffering from injury, not fatal to ordinary man; *See* Murder ... .. 515

**Permanent settlement, lands included in**—Question of fact; *See* Possession, suit for ... .. 141

**Person, when is said to be in occupation of holding for purpose of assessment of rates and taxes; *See* Assessment** ... .. 283

— holding adversely to the defaulting proprietor, liability of, after the confirmation of revenue sale; *See* Mesne profits ... .. 415

**Place of Public resort**—*Calcutta Suburban Police Act (II B. C. of 1866) Sec. 18—Stall in public road on which soda water is sold.*

A stall on which soda water is sold not for consumption on the premises, is not a place of public resort within the meaning of section 18 of the Calcutta Suburban Police Act. Hence a person commits no offence in selling soda water and other aerated water and non-intoxicating beverages on a stall in a public road, without a license for the sale thereof.

*Hemanta Kumar Sen v. King-Emperor* ... .. 198

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | PAGE. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Plaint, amendment of—Object ; <i>See</i> Pardanashin lady                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 529   |
| — in collision cases ; <i>See</i> Collision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 178   |
| Plaintiff, if can claim mesne profits subsequent to an offer by defendant to restore him possession ; <i>See</i> Mesne profits                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 415   |
| Pleading and proof, variance between, if fatal ; <i>See</i> Pardanashin lady                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 529   |
| Police-officer, investigating, statement made by relative of prosecutor to, if can be contradicted ; <i>See</i> Evidence, admissibility of                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 53    |
| —, investigating, statement made by relative of prosecutor to, if can be corroborated ; <i>See</i> Evidence, admissibility of                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 53    |
| — officers, evidence of—Statements made by persons ; <i>See</i> Evidence, admissibility of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 53    |
| — service tenures ; <i>See</i> Palayams                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 6     |
| Possession, adverse, by tenant, nature of ; <i>See</i> Landlord and tenant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 133   |
| —, adverse, continuance of—Land incapable of use and enjoyment by rightful owner ; <i>See</i> Title, declaration of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 302   |
| —, adverse, nature of—Title ; <i>See</i> Landlord and tenant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 133   |
| —, constructive, of land—Intervention of public authorities for preservation of peace ; <i>See</i> Title, declaration of                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 302   |
| —, delivery of, if necessary—Settlor appointing himself as first mutwalli ; <i>See</i> Wakf                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 444   |
| Possession, lawful—Evidence ; <i>See</i> Adverse possession                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 432   |
| —, suit for— <i>Bengal Tenancy Act (VIII of 1885), section 95 (a), 97—</i><br><i>'Estate'—Reformation—Accretion—Power of Manager of Court of Wards to sue—Suit barred by special law of limitation—Party, if entitled to deduct two months for service of notice under section 80 of the Code of Civil Procedure (Act V. of 1908),—Limitation, plea of—Limitation, when to be decided against a party—Book, containing history of a district, admissibility of—Presumption of continuity, applicability of—</i><br><i>Rennell's map—Presumption of accuracy—Evidence Act (I of 1872), Section 83.</i> |       |

When the Bengal Tenancy Act gives the District Judge the power to direct that an estate be managed by the Court of Wards, in such case that body has the same powers as it has in regard to other estates directly coming within the provisions of the Court of Wards Act. In the latter case, there would be a power of suit in the Court of Wards.

Section 97 of the Bengal Tenancy Act gives the Court of Wards power to sue in the case of an estate which comes to it under the provisions of section 95 (a) of the Act.

The word 'estate' in section 95 (a) of the Bengal Tenancy Act, means all that the holder is entitled to by way of reformation or accretion. The lands which were handed over to the Manager of the Court of Wards and the lands which were subsequently reformed, are the whole estate.

In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under section 80 of the Civil Procedure Code.

**Possession—(Contd.).**

It is necessary that limitation should be pleaded in all cases. But particularly this is so where the bar is alleged under some special law.

The general rule is, that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact.

Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence.

If limitation is urged as bar, the facts on which it is barred, must be proved after an issue has been framed.

The mere fact that a book containing the history of a certain district was not referred to in the lower Court, may not be, of itself, a good objection. If, however, the book was used to establish the existence of facts which the party had no opportunity of meeting and which he desired to rebut, the admission of the book in the appellate Court might involve a remand.

The presumption of continuity varies with the circumstances of the case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known in the absence of evidence to the contrary.

Rennell's map was made some 22 years or so before the decennial settlement on which the permanent settlement proceeded. If it be referred to as evidence there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence. *Secretary of State for India in Council v. Annada Mohan Roy* ... ..

205

—, *suit for—Limitation—Dispossession by landlord—Bengal Tenancy Act (VIII of 1885), section 148 A, schedule III, Art 3—Arrears of rent, recovery of.*

Article 3, schedule III of the Bengal Tenancy Act is applicable, where the dispossession is effected by the tenants settled upon the land by co-sharer landlords with the help of their naib.

A suit under section 148 A of the Bengal Tenancy Act should be to recover the whole of the arrears due and not the entire rent payable for the holding. *Profulla Chandra Ghose v. Baburam Mandal* ... ..

462

—, *suit for—Limitation Act (IX of 1908), Sch. I, Art. 46—Limitation law, rule of construction of—Order under section 40(a) of the Bengal Survey Act (V-B, C. of 1875)—Suit, when instituted—Civil Procedure Code (Act V of 1908), O. 2 R. 2—Survey and thak maps, preference between—Thak map, evidence—Adverse possession—Land after submergence—Submergence, seasonal—Wrong-doer—Constructive possession.*

**Possession—(Contd.).**

A possessory order under section 40(1) of the Bengal Survey Act, bears an analogy to a decision under section 34 of Regulation VIII of 1822. The order, until reversed or modified by competent authority has the force of an order of a civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector.

It is contrary to sound canons of construction to enlarge the scope of the provisions of a statute of limitation, by importing into it words which are not to be found there.

A suit instituted more than three years had elapsed from the date of the order under section 41 of the Bengal Survey Act, is not barred by limitation under article 46 schedule I of the Limitation Act.

A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered.

If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred under order 2 rule 2 of the Code of Civil Procedure. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not every suit shall include every claim or every cause of action which the plaintiff may have against the defendant.

There is no inflexible rule that a survey map must have preference over a thak map. There is no general or definite rule making it incumbent upon the Courts to follow either the one or the other; the Court may, if it considers that the thak map is more reliable, follow that in preference to the survey map.

Where the thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to the suit, the thak map is a valuable evidence in a suit between the successors of the persons who were present.

Land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. This principle is applicable where the reflooding is seasonal and occurs for several months in each year. When the land is re-submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner.

The possession must be adequate in continuity, in publicity, and in extent of area, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass.

The doctrine of constructive possession cannot be applied in favour of a wrong-doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as re-

## Possession—(Contd.).

gards the portion of the land in suit of which he proves actual possession for the statutory period. *H. H. Maharaja of Cooch Behar v. Raja Mahendra Ranjan Rai Chaudhuri* ... .. 463

—, *suit for—Thak and survey maps—Lands included in Permanent Settlement—Burden of proof—Quinquennial papers, evidentiary value of—Hand sketches—Boundaries including area greater than referred to in return—Land after submergence, right to—Adverse possession—Possession, nature of—Submergence of reformed land—Re-flooding seasonal—Revenue sale, what is sold—Limitation Act (IX of 1908), Sch. I Arts. 140, 142, 144—Estate falling into possession—Adverse possession against limited estate holder.*

It cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement. The question, what lands were included in the Permanent Settlement, is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps.

The *onus* of proving that any particular lands were included in the Permanent Settlement of 1793 is on those who affirm that such was the case and the burden of proof is not necessarily shifted by the production of the *thak* and survey maps showing that specific lands are included in a particular estate. The *thak* and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement.

Quinquennial papers prepared by the revenue authorities from 1795 to 1799 under the provisions of Regulation XLVIII of 1793, are admissible in evidence.

Reliance can be placed upon hand sketches drawn up by the parties on the basis of the information derivable from the quinquennial papers and the *Hakikat Chauhaddi* papers.

If, in fact, the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate.

The land after submergence becomes derelict, and so long as it remains submerged, no title can be made against the true owner.

The nature of the possession required in an adverse possessor of waste lands sufficient to take the title out of the true owner, is that the possession must be adequate in continuity, in publicity, and in extent of area.

No rational distinction can be drawn between cases where reformed land is after a few years again submerged by the flood for a time, and cases where the re-flooding is seasonal and occurs for several months in each year.

In a sale held under Revenue Sale law (Act XI of 1859) what is sold is not

**Possession—(Contd.).**

the interest of the defaulting owner which is determined on the failure to pay the Government assessment, but the interest of the Crown subject to the payment of the Government assessment, and, therefore, the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale.

Under a deed of agreement, the mother-in-law of the plaintiff was to enjoy the properties of her adopted son for life; she was also to enjoy for life such immovable properties as she might acquire out of the profits of the properties of her adopted son in her possession, and the mother-in-law of the plaintiff purchased certain properties out of such profits. The husband of the plaintiff died on the 27th April, 1887, and her mother-in-law died on the 26th February, 1900. The present suit for possession was instituted on the 29th March, 1910:—

*Held*, that the plaintiff became entitled to possession only after determination of the limited or particular estate held by her mother-in-law and that estate did not fall into possession until her death, which took place within 12 years before the suit. To such a suit article 140, schedule I and not articles 142, and 144 of the Limitation Act were applicable.

Article 142, schedule I of the Limitation Act could not apply as the plaintiff was never in fact dispossessed; nor could article 144 apply, as possession of a trespasser could not be deemed adverse against a person not entitled to be in possession at that time. *The Secretary of State for India in Council v. Moulvi Wazed Ali Khan Panj* ... 141

|                                                                                                                        |     |
|------------------------------------------------------------------------------------------------------------------------|-----|
| — of tenant of land encroached upon, when adverse to landlord; <i>See</i> Landlord and tenant                          | 133 |
| — of wrong-doer, if continues—Sub-mergence of land, either for a year or for a month; <i>See</i> Possession, suit for  | 465 |
| Possessor, adverse—Possession, nature of; <i>See</i> Possession, suit for                                              | 141 |
| Posthumous son, if bound by deed of relinquishment executed by Hindu widow in possession; <i>See</i> Family settlement | 323 |
| — son, if bound by an alienation by his mother, of his paternal estate before his birth; <i>See</i> Family settlement  | 323 |
| — son, rights of, how to be determined; <i>See</i> Family settlement                                                   | 323 |
| — son, title when commences; <i>See</i> Family settlement                                                              | 323 |
| Powers of several executors, if can be exercised by any one of them; <i>See</i> General grant                          | 457 |

**Prescription—Land for use as burial ground—Acquiescence—Easement, new species of—Customary right—Floodings—Custom, requisites of—Custom and prescription, difference between—Remand on issue not raised in pleadings.**

Land for use as a burial ground may be acquired through purchase or dedication. But law does not recognise that an easement by prescription can be created by the mere fact that dead bodies are placed in graves on the land of another and permitted to remain there for the prescriptive term.



**Prescription—(Contd.).**

The right to bury in a given tract of land cannot be deemed a right imposed for the beneficial enjoyment of land. There is no such thing as a dominant heritage to which the easement right can attach and the right to bury upon a tract of land in no sense falls within the general definition of the term "easement."

Where the owner of land has acquiesced in the burial of dead bodies on his property, apart from all questions of acquisition of title by adverse possession, a Court of justice may prevent the desecration of the graves.

The Court will not create a new species of easement specially, if the easement claimed, constitutes a nuisance.

When a customary right is claimed, it should be specifically pleaded; all the essential requisites to its validity and binding effect must be averred and the custom so pleaded must when put in issue, be proved as laid.

When a plaintiff sets up a prescriptive right, he cannot in fairness to the defendant, be allowed to succeed on the basis of a customary right.

A custom must be immemorial, reasonable; continued without interruption since its immemorial origin, certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

Custom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law.

Even if an appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the trial Court, this ought only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away. *Gopal Krishna Sii v.*

*Abdul Samad Chaudhuri* ... .. 319

**Prescriptive right, setting of—Customary right; See Prescription** ... 319

**Presidency Towns Insolvency Act, Section 13, sub-section (3)—Omission to serve notice, effect of; See Notice** ... .. 349

—, Section 36—Order for discovery, if disobeyed, effect of; *See Discovery* ... .. 351

**Presumption—Adoption took place long before—Treatment by members of family and in public transactions; See Adverse possession** ... 432

—Continuance of partnership—Intention to retire from partnership business—Continuing to take things from partnership business and associating otherwise with its work; *See Partnership* ... 405

—Declarations of wakf not acted upon by settler and its objects are not given effect to; *See Wakf* ... .. 444

—Easement of necessity—Part of tenement retained by grantor after disposing; *See Easement* ... .. 518

—Entry in record-of-rights—Non-agricultural land—Bengal Tenancy Act (VIII of 1885), Sec. 103 (B) Sub-sec. (3).

If an entry has been made in the record-of-rights with regard to land which does not come within the scope of the Bengal Tenancy Act, and with regard to which the revenue officer had no jurisdiction to make the entry,

**Presumption—(Contd.).**

the presumption under section 101 B (3) of the Bengal Tenancy Act is not of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. *Raja Sasi Kanta Acharjya Bahadur v. Sandhya Moni Dasya* ...

504

— Possession, lawful or unlawful—Evidence; *See* Adverse possession ...

432

— Thak and survey maps—State of things at Permanent Settlement; *See* Possession, suit for ...

141

— of continuity—Applicability; *See* Possession, suit for ...

205

**Primogeniture** sanad, construction of—"Successors," meaning of—Person taking by alienation; *See* Oudh taluqdars ...

113

**Privy Council**—Decision resting on discretion—Varying views of lower Courts; *See* Partition ...

56

**Procedure**—Statement in judgment as to admission—Litigant aggrieved; *See* Title, declaration of ...

302

**Proof**, nature of, to establish a will; *See* Will ...

384

**Prosecution**—*Withdrawal from—Criminal Procedure Code (Act V of 1898), Sec 494, order under, effect of—Charges, addition of—Criminal Procedure Code, Secs. 226, 227—Penal Code (Act XLV of 1860), Secs 497, 498.*

An order by which the Court acting under section 494 of the Code of Criminal Procedure, accords consent to the withdrawal from a prosecution, is a judicial order and for every such order the reasons should be given so that High Court acting in its Revisional Jurisdiction may be in a position to examine into the matter and determine whether the discretion vested in the Court has been properly exercised.

The Court of Sessions may add charges under sections 497 and 498 of the Indian Penal Code, in the manner indicated in section 226 and the following sections of the Code of Criminal Procedure, when the complaint of the husband was not merely of offences involving the use of force but was also a specific complaint of the offence punishable under the aforesaid sections of the Penal Code. *Rajani Kanta Shaha v. Idria*

*Thakur* ...

51

**Purchaser**, notice to, by title deed, effect of; *See* Notice ...

256

— at a sale for arrears of revenue—Title, whose, is acquired; *See* Mesne profits ...

415

— at a sale for arrears of revenue, rights of—Person holding adversely to the defaulting proprietor, liability of, after the confirmation of revenue sale; *See* Mesne profits ...

415

**Putni** lease containing no stipulation as to rent payable for chakran land—

Chaukidari chakran land resumed - Rent payable to Zemindari; *See*

Chaukidari chakran land ...

275

• **Putni** Regulations, Secs 8, 10—Strict conformity with the requirements; *See*

Putni sale ...

399

—, Sec. 10—Self-contained notice; *See* Putni sale ...

399

**Putni** sale—*Putni Regulation (VIII of 1819), sections 8, clause (e), 10—*

**Putni Sale—(Contd.).**

*Notice to be stuck up in Collector's cutchery—Requirements of Putni Regulation to be strictly confirmed—Forms, observance of.*

Section 10 of Putni Regulation contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held.

The notice to be stuck up in the cutchery of the Collector, like the petition, must contain specification of the balances that may be due to the zemindar concerned from all the putnidars under him and a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter.

Strict conformity with the requirements of the Putni Regulation in respect of the contents and service of the notice mentioned in sections 8 and 10 is essential to secure a valid sale.

The zemindar is exclusively answerable for the observance of the forms prescribed in section 8, clause (2) of the Putni Regulation. *Reja Bhupendra Narain Singh Bahadur v. Madar Bux Sheikh* ... ..

399

*Quinquennial papers prepared by revenue authorities under the provisions of Regulation 48 of 1793, admissibility in evidence; See Possession, suit for Raiyat at a fixed rate, if can acquire a right of occupancy—Bengal Tenancy Act, section 20; See Ejectment* ... ..

141

233

**Receiver—Civil Procedure Code (Act V of 1908, O. 40, R. 1, (2)—Finding as to allegations necessary—Receiver, if can enquire into claim of title—Court, if can delegate power of enquiry to receiver.**

The Court, on an objection being made by persons who are no parties to the suit, claiming the properties to be theirs and in their possession, is bound by clause (2) of the rule 1 of order 40 of the Code of Civil Procedure, to come to a definite finding as to the truth of these allegations before it can make an order directing the receiver to take possession of the properties. Such allegations in the petition cannot be disposed of on the ground of a discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others when they applied to be added as parties to the suit.

It is not the duty of a receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the receiver. *Hamida Rahman v. Jamila Khatun* ... ..

123

**Receiver, if can enquire into claim of title by third parties; See Receiver** ... ..

123

**Rectification—Mortgage deed—Misdescription—Specific Relief Act (1 of 1877), Section 31—What to be proved—Reformation—Mistake in mortgage deed reproduced in decree, if can be rectified—Unilateral mistake.**

**Rectification—(Contd.).**

The plaintiff who seeks the assistance of the Court under section 31 of the Specific Relief Act for the rectification of the written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing, this did not express or give effect to the agreement. The mistake must be mutual that is, a mistake reciprocal and common to both parties. In other words, each must labour alike under the same misconception in respect to the terms of the written instrument.

In order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong.

Where the defendant is shown to have been aware not only that the instrument did not express the real agreement but also that the plaintiff was ignorant of the discrepancy between the instrument and the agreement, the case is one for reformation.

Where there is unilateral mistake, rectification is refused.

If there is a mutual mistake in a mortgage deed in the description of property and the same mistake is reproduced in the decree which is not resulted in sale in execution thereof, equity may go back to the original transaction and reform both the mortgage deed and the decree so as to make them conform to the intention of the parties concerned.

Misdescription of property involved in a litigation is sufficient to render the doctrine of *lis pendens* applicable in the case of a person having knowledge or notice of the true state of things. *Bepin Krishna Roy v. Jogeswar Roy* ... .. 256

Rectification, conditions for; *See* Rectification ... .. 256

Reference to argument of defence pleader, if sufficient; *See* Jury trial ... 512

Re floodlog seasonal—Occurring for several months in each year; *See* Possession, suit for ... .. 141

Reformation, case of; *See* Rectification ... .. 256

Regularity of forms, minute observance of—Persons not familiar with legal procedure—Justice, principles of; *See* Arbitration ... .. 39

Regulation VIII of 1819, Secs. 8 cl. (2), 10 ... .. 399

Relief against forfeiture—Decree passed on compromise—Jurisdiction of Court; *See* Ejectment ... .. 157

Rennell's map referred to as evidence—Presumption of accuracy—Evidence *See* Sec. 83; *See* Possession, suit for ... .. 205

Rent—Putni lease containing no stipulation as to rent payable for chakran lands; *See* Chakridari chakran land ... .. 275

—, —abatement of—Case, before Bengal Tenancy Act came into force—No agreement—Diluvion; *See* Burden of proof ... .. 35

|                                                                                                                                                                                                                                                                                                                                                                                                          |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Rent, liability for—Person deprived of possession of part of demised premises; <i>See</i> Landlord and tenant                                                                                                                                                                                                                                                                                            | 119 |
| —, liability for—Tenant deprived of part of leasehold property; <i>See</i> Landlord and tenant                                                                                                                                                                                                                                                                                                           | 119 |
| —, suit for—Intermediate tenure-holder between putnidar and durputnidar, if can sue durputnidar; <i>See</i> Intermediate tenure                                                                                                                                                                                                                                                                          | 76  |
| —, suit for—Mirasdar between Zemindar and putnidar, if can recover rent from putnidar; <i>See</i> Intermediate tenure                                                                                                                                                                                                                                                                                    | 77  |
| —suit—Representation; <i>See</i> Title, declaration of                                                                                                                                                                                                                                                                                                                                                   | 302 |
| Representation—Decree for rent, when binding against all persons interested in tenancy—Decree against same person interested in tenancy; <i>See</i> Title, declaration of                                                                                                                                                                                                                                | 302 |
| Res-judicata—Notice of application for execution—Omission to object at proper stage; <i>See</i> Limitation                                                                                                                                                                                                                                                                                               | 163 |
| —Suits for damages—Suits tried together—Separate judgments—Issue same—Earlier decision operating as res judicata.                                                                                                                                                                                                                                                                                        |     |
| Suits for damages were brought first by A against B and then by B against A. They were tried together upon the same evidence, the question at issue was common to both, but separate judgments were pronounced. The suit by A was dismissed, but the other suit was decreed. A appealed against the decree in the suit brought by B but did not appeal against the decree in the suit instituted by him: |     |
| <i>Held</i> , that the decision in the suit brought by A not having been appealed against, operated as <i>res judicata</i> in the other suit. <i>Gangadhar Kalwar v. Sekall Telhal</i>                                                                                                                                                                                                                   | 281 |
| Revenue Sale Law, Sec. 37—'Settlement'—Contract—Bajecapti taluq; <i>See</i> Ejectment                                                                                                                                                                                                                                                                                                                    | 485 |
| —, sale under—What is sold; <i>See</i> Possession, suit for                                                                                                                                                                                                                                                                                                                                              | 141 |
| Revenue-sale-purchaser's title; <i>See</i> Mesne profits                                                                                                                                                                                                                                                                                                                                                 | 415 |
| Right, customary, to be specifically pleaded; <i>See</i> Prescription                                                                                                                                                                                                                                                                                                                                    | 319 |
| —to bury in a given tract of land, if easement; <i>See</i> Prescription                                                                                                                                                                                                                                                                                                                                  | 319 |
| Rights to be sold—Cultivating rights, question as to; <i>See</i> Estoppel                                                                                                                                                                                                                                                                                                                                | 1   |
| Sale valid—Strict conformity with the requirements of Putni Regulation, Secs. 8, 10; <i>See</i> Putni sale                                                                                                                                                                                                                                                                                               | 399 |
| Sanad, primogeniture, construction of—"Successors", meaning of—Person taking by alienation; <i>See</i> Oudh taluqdars                                                                                                                                                                                                                                                                                    | 113 |
| Scribe, if a competent attesting witness; <i>See</i> Attesting witness                                                                                                                                                                                                                                                                                                                                   | 498 |
| Sessions Judge, if to repeat everything said by defence pleader in his speech; <i>See</i> Jury trial                                                                                                                                                                                                                                                                                                     | 512 |
| Severance—Part retained by grantor—Presumption—Easement of necessity; <i>See</i> Easement                                                                                                                                                                                                                                                                                                                | 518 |
| Shebait, grounds for removal of; <i>See</i> Shebait, office of                                                                                                                                                                                                                                                                                                                                           | 86  |
| —, office of—Grounds for removal—Incapacity of trustee to purchase trust estate, not confined to case of trustee for sale—Basis of the rule—Secret purchases by trustee never permissible.                                                                                                                                                                                                               |     |

The grounds for removing a shebait from office may not be identical with those upon which a trustee would be removed in England, but if a shebait in the exercise of his duties has put himself in a position which precludes

Shebait—(Contd.).

him from faithfully discharging the obligations of his office, that is sufficient ground for his removal.

A trustee, if not a trustee for sale, can acquire an estate from beneficiaries who are *sui juris*, but only if he has made the fullest disclosure to them of all facts within his knowledge as to the value and condition of the estate and the parties are at arm's length : otherwise the purchase is bad. The basis of the rule is that a person occupying a fiduciary relation may not use for his own benefit information which he has acquired as to the trust estate.

Even if a person in a fiduciary position is otherwise entitled to purchase, yet if he effects the purchase secretly in another person's name, such purchase can never be allowed to stand. *Raja Peary Mohan Mukerjee v Monohar Mukerji* ... .. 89

Signature, person's, character of ; *See Will* ... .. 373

—, unproved, effect of ; *See Will* ... .. 373

Signatures, two, identical—Effect of ; *See Will* ... .. 373

—, two, resemblance of *See Will* ... .. 373

Small Cause Court decree transferred to ordinary Court for execution—Order passed in execution ; *See Appeal* ... .. 477

Son, posthumous, if bound by an alienation by his mother, of his paternal estate before his birth ; *See Family settlement* ... .. 323

—, posthumous, if bound by deed of relinquishment executed by Hindu widow in possession ; *See Family settlement* ... .. 323

Specific performance—*Contract to lease—Suit brought within limitation period—Limitation Act (IX of 1908), Sch I, Art. 113—Delay—Status quo—Material alteration in value of property.*

The proposition that delay, which is short of the period prescribed by the Limitation Act, which is of such a character as to give rise to an inference of abandonment of right and which is shown to have prejudiced the defendant, is a bar to a suit for specific performance.

Where the plaintiff's delay in filing a suit for specific performance of a contract to grant a putni lease to him, though three days before the time specified in article 113, schedule I, of the Limitation Act, has caused a material alteration in the value of the property because it led the tenants to hope that the lease would never be given and to agree to pay enhanced rent in order to prevent it from ever being given, the matter is not *status quo* at the time the suit was brought. *Maharaj Bahadur Singh v. Suresh Chandra Roy* ... .. 364

Specific Relief Act, Sec. 31—Proof—Mistake, nature of ; *See Rectification* ... .. 256

—, Sec. 54—Roots of a sacred tree penetrating neighbour's land ; *See Mandatory injunction* ... .. 315

—, Sec. 55—Branches of a tree overhanging neighbour's land ; *See Mandatory injunction* ... .. 315

—, Sec. 55—'Obligation' ; *See Mandatory injunction* ... .. 315

|                                                                                                                                                                                                                                                                                                                                                                      |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Specific Relief Act, Sec. 55—Roots of a tree penetrating neighbour's land ;<br><i>See</i> Mandatory injunction                                                                                                                                                                                                                                                       | 313 |
| Statement in judgment as to admission—Litigant aggrieved—Procedure ; <i>See</i><br>Title, declaration of                                                                                                                                                                                                                                                             | 302 |
| — in judgment as to admission, how to be refuted ; <i>See</i> Title,<br>declaration of                                                                                                                                                                                                                                                                               | 302 |
| — made to investigating Police officer by relative of prosecutor—<br>Corroboration ; <i>See</i> Evidence, admissibility of                                                                                                                                                                                                                                           | 53  |
| — made to investigating Police officer by relative of prosecutor, if cap<br>be contradicted ; <i>See</i> Evidence, admissibility of                                                                                                                                                                                                                                  | 53  |
| Submergence of reformed land—Re-flooding seasonal—Occurring for several<br>months in each year ; <i>See</i> Possession, suit for                                                                                                                                                                                                                                     | 141 |
| Submergence of land, effect of ; <i>See</i> Possession, suit for                                                                                                                                                                                                                                                                                                     | 465 |
| Substitution—Application rejected—Application to be added as respondents<br>legal representatives of the deceased co-appellant—Suit by a firm against<br>another firm ; <i>See</i> Partnership                                                                                                                                                                       | 405 |
| Suit, maintainability of—Defendant being major, misdescribed as minor and<br>guardian <i>ad litem</i> appointed—Suit decreed—Subsequent suit by<br>defendant ; <i>See</i> Title, declaration of                                                                                                                                                                      | 302 |
| —, stay of— <i>Indian Arbitration Act (IX of 1899), section 19—Matter agreed<br/>        to be referred.</i>                                                                                                                                                                                                                                                         |     |
| Before an order for stay of suit can be made under section 19 of the Indian<br>Arbitration Act, it must be established that the suit has been instituted in<br>respect of a matter agreed to be referred. <i>Jnanendra Krishna Bose v.</i><br><i>Sinclair Murray &amp; Co.</i>                                                                                       | 173 |
| —, when instituted ; <i>See</i> Possession, suit for                                                                                                                                                                                                                                                                                                                 | 465 |
| —, by a firm against another firm—Names of the members of the defendant<br>firm disclosed—Death of one of the members of the plaintiff firm—Applica-<br>tion for substitution after time—Application by surviving appellants<br>to add as respondents legal representatives of the deceased co-appellant<br>—Inherent power of Court to add ; <i>See</i> Partnership | 405 |
| — for specific performance—Delay, short of the period prescribed by the<br>Limitation Act, when a bar ; <i>See</i> Specific performance                                                                                                                                                                                                                              | 364 |
| — to take accounts and wind up the affairs of a partnership—Party ; <i>See</i><br>Partnership                                                                                                                                                                                                                                                                        | 405 |
| Survey and thak maps, preference between ; <i>See</i> Possession, suit for                                                                                                                                                                                                                                                                                           | 465 |
| Talak-i-bain—Divorce, when takes effect ; <i>See</i> Divorce                                                                                                                                                                                                                                                                                                         | 524 |
| Talak-hasan—Divorce, when takes effect ; <i>See</i> Divorce                                                                                                                                                                                                                                                                                                          | 524 |
| Talak-ahsan—Divorce, when takes effect ; <i>See</i> Divorce                                                                                                                                                                                                                                                                                                          | 524 |
| Tenancy created under decree on consent—Legality of a provision for eject-<br>ment how tested ; <i>See</i> Ejectment                                                                                                                                                                                                                                                 | 157 |
| Tenant— <i>Encroachment—Kabuliat—Rent to be paid for encroached land—<br/>    Land, if to be annexed against the wishes of landlord.</i>                                                                                                                                                                                                                             |     |
| If a tenant encroaches upon the adjoining waste of his landlord, the latter is<br>entitled to treat him either as a trespasser or as a tenant. If the landlord<br>treats him as a trespasser, he is entitled to sue him in ejectment within 12<br>years from the date when he becomes aware of the encroachment. If he                                               |     |

## Tenant—(Contd.).

treats him as a tenant, then he becomes liable to pay additional rent.

A *kabuliat* in favour of the landlord contained the following: "If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that survey, whether lying inside or outside the boundaries mentioned in the *kabuliat* and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the *kabuliat* have been enjoyed secretly."

*Held*, that the clause did not entitle him to annex the adjoining land and retain possession thereof against the wishes of the landlord. *Abdul Hossain v. Afsaruddin* ... .. 481

Tenant, encroaching upon the adjoining waste of his landlord—Landlord, right of; *See* Tenant ... .. 481

Tenant's possession of land encroached upon, when adverse to landlord; *See* Landlord and tenant ... .. 133

That map, evidentiary value of—That proceedings and decision of dispute took place in presence of predecessors of parties to suit; *See* Possession, suit for ... .. 465

—and survey maps—State of things existing at Permanent Settlement—Presumption; *See* Possession, suit for ... .. 141

—and survey maps, evidentiary values of; *See* Possession, suit for ... .. 141

Time, bar of, when ceases to run—Bankruptcy—Adjudication; *See* Limitation ... .. 167

—, bar of, when ceases to run further—Adjudication—Bankruptcy; *See* Limitation ... .. 167

—, deduction of—Injunction and order for stay of execution—Stay of execution of decree as regards one half share of one of four properties—Stay of execution as regards remaining properties by order of Court; *See* Limitation ... .. 163

—for payment of money—Time fixed by lower Court—Decree of the lower Court confirmed on appeal—Appellate Court not providing for time for payment; *See* Mesne profits ... .. 415

Title—Land under submergence—True owner; *See* Possession, suit for ... .. 141

—Submergence of land—Reflooding seasonal and occupying for several months in each year; *See* Possession, suit for ... .. 465

—True owner—Land submerged; *See* Landlord and tenant ... .. 133

—, declaration of—Limitation—Attachment under section 146 of Code of Criminal Procedure (Act V of 1898)—Adverse possession—Misdescription of defendant as minor—Certificated guardian proposed as guardian ad litem—His consent, if necessary—Civil Procedure Code (Act XIV of 1882), Section 443—Rent suit—Representation—Decision of Court, to rest on what—Statement in judgment as to admission, how to be refuted.

When a property is attached under section 146 of the Code of Criminal



## Title—(Contd.).

Procedure, it passes into legal custody, and during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law.

The intervention of public authorities for the preservation of peace, operates in the same way as the *vis major* of the floods, and the constructive possession of the land is thereafter, if anywhere, in the true owner.

There can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner.

Where the defendant was misdescribed as a minor and a guardian *ad litem* was appointed, although he had in fact attained majority, a suit subsequently instituted by him to set aside the decree should be dismissed, on the ground that he was bound by the decree in the former suit, inasmuch, though aware of the suit and the execution proceedings which resulted in the sale, (as order for the appointment of a guardian *ad litem* was made after notice to the alleged minor and the proposed guardian), he still allowed his guardian to conduct the defence and the proceedings on his behalf as guardian for the suit.

In the absence of a provision in the Code of Civil Procedure of 1882 corresponding to order 32 rule 4, sub-rule (3) of the Code of 1908, where a certificated guardian was proposed for appointment as guardian *ad litem* the Court might, unless he declined the appointment, presume his consent.

A person can, under certain circumstances, represent the tenancy so as to entitle the landlord to obtain in a suit brought against that person, a decree binding upon all the persons interested in the tenancy.

The decision of a Court should rest not upon suspicion but upon legal grounds established by legal testimony.

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the appellate Court, specially in the absence of an affidavit by the vakil who appeared in the Court of first instance. In cases of this character, where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. *Sarat Chandra Maiti v. Bibhabai Debi* ... .. 302

— deed, notice to purchaser by, effect of; *See* Notice ... .. 256

— to estate—Boundaries including area for greater than that referred to in the returns; *See* Possession, suit for ... .. 141

Transfer of one part of tenement by owner of two tenements, effect of; *See* Easement ... .. 512

|                                                                                                                                                                     |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Transfer of one part of tenement by owner of two tenements—Condition of such land, how to be determined ; <i>See</i> Easement                                       | 518 |
| — of one part of tenement by owner of one tenement divided into two parts—Condition of such land, how to be determined ; <i>See</i> Easement                        | 518 |
| — of one part of tenement by owner of one tenement divided into two parts, effect of ; <i>See</i> Easement                                                          | 518 |
| — of Property Act, Section 52—'Contentious' ; <i>See Lis pendens</i>                                                                                                | 96  |
| Trespasser, <i>bona fide</i> and <i>mala fide</i> , difference between, as to payment of mesne profits ; <i>See</i> Mesne profits                                   | 413 |
| Trustee, if and when can acquire estate from beneficiaries ; <i>See</i> Shebait, office of                                                                          | 86  |
| —, incapacity of, to purchase trust estate, not confined to case of trustee for sale ; <i>See</i> Shebait, office of                                                | 86  |
| —, secret purchase by, if permissible ; <i>See</i> Shebait, office of                                                                                               | 86  |
| Unborn child, for what purpose treated as born ; <i>See</i> Family settlement                                                                                       | 323 |
| Unilateral mistake, effect of ; <i>See</i> Rectification                                                                                                            | 256 |
| Unlawful obstruction—Removal of—Criminal Procedure Code (Act V of 1898), Section 133—Fixing arbitrarily time for cross-examining—Finding as to bona fides of claim. |     |

The Sub-Divisional Magistrate in a proceeding under section 137 of the Code of Criminal Procedure for removal of unlawful obstruction to a water channel, fixed five minutes for the cross-examination of the witnesses. He also did not come to any clear finding as to the *bona fides* of the claim set up by the party against whom the order was directed :

*Held*, that the order passed under section 137 of the Code of Criminal Procedure, was bad. *Emperor v. Abed AH Tufani*

172

|                                                                                                         |    |
|---------------------------------------------------------------------------------------------------------|----|
| Valuation for assessment of Court-fees—Valuation for purposes of jurisdiction ; <i>See</i> Jurisdiction | 94 |
|---------------------------------------------------------------------------------------------------------|----|

|                                                                             |     |
|-----------------------------------------------------------------------------|-----|
| Variance between pleading and proof, if fatal ; <i>See</i> Pardanashin lady | 529 |
|-----------------------------------------------------------------------------|-----|

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Wakf—Hanafi law—Wakf Validating Act (VI of 1913), Section 3(b)—Payment of debts out of rents and profits of Wakf property—Mortgage, existence of, at the date of wakf—Valid wakf, how created—Intention to create—Settlor appointing himself mutwalli—Delivery, formal, of possession, if necessary—Mau-ul-maut—Death-illness, existence of—Question of fact—Health of settlor, state of, at the date of wakf—Direct evidence not available—Antecedent and subsequent conditions of settlor—Statements in the report of the Commissioner and in the certificate given by Kabiraj, admissibility of. |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

Under section 3 (b) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a wakf for the payment of his debts out of the rents and profits of the property dedicated.

The existence of a mortgage at the time of creation of the endowment, does not render the endowment invalid under the Mahomedan law.

Under Hanafi law, a valid wakf is created by declaration of endowment by the owner and delivery of possession is not essential. Appointment of a mutwalli is not essential to the validity of a wakf.

A mere intention to set apart property for charitable purposes is not sufficient to create a valid wakf.

## Wakf—(Contd.).

Where the settlor appoints himself as a first mutwalli, no formal delivery of possession from himself to himself is necessary even according to Imam Mohammad.

Where the declaration of a wakf is not acted upon by the settlor and its objects are not given effect to, it may be presumed that the wakf was not completed or the settlor had no *bona fide* intention to create a wakf.

Gifts made by a Mussalman during *maras-ul-maut* or death-illness cannot take effect beyond a third of the surplus of his estate, after payment of funeral expenses and debts unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death; similarly, a wakf made in death-illness is valid only to the extent of a third of the net estate left by the deceased, unless the heirs consent.

A Muslim who is in *maras-ul-maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a wakf in such illness unless his heirs consent, the wakf will affect only one-third of his estate and will be invalid in respect of the excess; it operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated mutwalli.

In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death, namely, (a) proximate danger of death, so that there is a preponderance of apprehension of death; (b) there must be some degree of subjective apprehension of death in the mind of the sick person, and (c) there must be some external indicia, such as inability to attend to ordinary avocations.

Whether or not a particular illness constitutes *maras-ul-maut* is primarily a question of fact; but it may sometimes be a mixed question of law and fact, as where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *maras-ul-maut* as formulated by Mahomedan jurists.

When direct evidence of the state of health of the settlor on the date of the deed of wakf is not available, the evidence of antecedent and subsequent conditions of the settlor should converge to that point of time.

Where neither the commissioner nor the kabiraj has been examined as a witness, the statements in the report by the commissioner to the Court and in the certificate given by the kabiraj are not admissible in evidence.

Bibi Jinnira Khatun v. Mahomed Fakirulla Mea ...

444

—, declarations of, not acted upon by settlor and its objects are not given effect to—Presumption; See Wakf ...

444

—, valid, how created under Hanafi law—Delivery of possession, if necessary; See Wakf ...

444

—, valid, if created—Intention to set apart property for charitable purposes; See Wakf ...

444

|                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Wakf for the payment of debts out of the rents and profits of the property dedicated, if valid—Wakf Validating Acts, Sec. 3 (b) ; See Wakf ... | 444 |
| —made in death illness, effect of ; See Wakf ...                                                                                               | 444 |

Will—*Genuineness of disposition—Provisions prima facie reasonable—Witness, veracity of—Means of contradiction to be produced—Witness, not wealthy if trustworthy—Standard of proof to establish a will—Forgery, question of, in Civil suit—Burden of proof—Party propounding a will—Suspicion—Attesting witnesses to will, if all to be examined—Interference with findings of facts by the appellate Court.*

Where the provisions of a will can in no sense be deemed inofficious or unnatural, but, on the contrary, are *prima facie* reasonable, as not disregarding the moral claims of the relatives of the testator which the ties of kinship suggest, they do not excite suspicion as to the genuineness of the disposition.

It is not enough to suggest doubts as to the veracity of a witness ; if the means of contradiction are available to the party who challenges his truthfulness, these should be produced before the Court.

It cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy.

The standard of proof to establish a will required by the Indian statutes is that of the prudent man and not an absolute or conclusive one. The Indian Evidence Act, while adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is, at the same time, expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable.

The *onus probandi* lies in every case upon the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator; in other words, wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless the suspicion is removed. The suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Though it is desirable that all the attesting witnesses capable of being called, should be examined to remove all suspicion of fraud, it is not absolutely necessary that where there are many attesting witnesses, the absence of every one not called, should be specifically explained.

The verdict of a judge trying the case should not be lightly disregarded where the issue is simple and straightforward and the only question is which set of witnesses is to be believed. But it is otherwise, where the determination of the question of genuineness of a will depends not merely upon assertions of witnesses but upon surrounding facts and circumstances whose

## Will—(Contd.).

existence is either admitted or indisputably proved, and the judgment of the primary Court is vitiated by his failure to test the veracity of the witnesses by reference thereto. *Prasannamayee Debi v. Baikuntha Nath Chatteraj* — ... 384

— *Preparation—Suspicious circumstances—Suspicion—Acquittal—Continuous Evidence—Improbability—Will, construction of, rule for—Hand-writing, proof of—Evidence Act (I of 1872), sections 47, 73—Comparison of hand writings—Signatures.*

Wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But this suspicion must be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Where there has been acquittal the acquittal is conclusive.

In order to prevail against such evidence as has been adduced, the improbability must be clear and cogent and must approach very nearly to, if it did not altogether constitute, an impossibility. The objection that the witnesses might have been of a better class is at an end when execution and attestation are proved.

In the case of a will reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety.

The ordinary methods of proving hand-writings are (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the hand-writing by virtue of section 47 of the Evidence Act; (ii) by a comparison of hand-writing as provided in section 73 of the Evidence Act; and (iii) by the admission of the person against whom the document is tendered.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

The provision of section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person. The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.

A comparison of hand writing is at all times as a mode of proof, hazardous

## Will—(Contd.).

and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.

A comparison of hand-writing is a mode of ascertaining the truth which ought to be used with very great caution.

Although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine.

If two signatures are exactly identical, there is reason for suspicion that the one in question may be a copy or careful imitation of the genuine signature.

The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent, but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such a facsimile that one is a perfect match to the other in every respect.

It is not difficult to forge the hand-writing of almost any person so that it may be impossible for even the most acute and experienced judge to discriminate between the false and the true. *Sarojini Das v. Haridas Ghosh* ... 373

|                                                                                                                                                                                                     |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Will, construction of; <i>See</i> Will                                                                                                                                                              | 373 |
| —, preparation of—Suspicion nature of; <i>See</i> Will                                                                                                                                              | 373 |
| —, preparation of—Suspicion, nature of; <i>See</i> Will                                                                                                                                             | 384 |
| —, when does not excite the suspicion as to the genuineness of the disposition; <i>See</i> Will                                                                                                     | 384 |
| —, prepared under suspicious circumstances; <i>See</i> Will                                                                                                                                         | 373 |
| Witness, if trustworthy—Witness, not wealthy; <i>See</i> Will                                                                                                                                       | 384 |
| —, unfavourable, if hostile; <i>See</i> Evidence, admissibility of                                                                                                                                  | 107 |
| —, veracity of, how can be questioned; <i>See</i> Will                                                                                                                                              | 384 |
| —, attesting, if all to be examined; <i>See</i> Will                                                                                                                                                | 384 |
| Wrong-doer, possession of, if continues—Submergence of land, either for a year or for a month; <i>See</i> Possession, suit for                                                                      | 405 |
| Zemindar, if can interpose between himself and his tenant, and intermediate holder who can realise rent payable to himself by his original tenant; <i>See</i> Intermediate tenure                   | 79  |
| —, rights and duties of—Zemindar interposing between himself and his tenant, an intermediate holder, who can realise rent payable to himself by his original tenant; <i>See</i> Intermediate tenure | 79  |
| —, exclusively answerable for the observance of forms prescribed in section 8 cl. (2) of the Putni Regulation; <i>See</i> Putni sale                                                                | 399 |

ERRATA.

"Page 467 l. 2 for "Position" read "Portion"

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and  
OTHER MATTERS.

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# INDEX TO SHORT NOTES

## VOL. XXXIV.

### ARTICLES.

|                                                                     |                 |
|---------------------------------------------------------------------|-----------------|
| Deposit of rent under sections 61 and 149 of the Bengal Tenancy Act | 57              |
| Distribution of High Court Benches                                  | 12 <sup>n</sup> |
| Lawyer in literature, The                                           | 15 <sup>n</sup> |
| Our New Judge                                                       | 11 <sup>n</sup> |
| Succession Certificate Act, The                                     | 9 <sup>n</sup>  |
| Unrobed Magistrates                                                 | 1 <sup>n</sup>  |

### NOTES ON CASES.

|                                                                  |                 |
|------------------------------------------------------------------|-----------------|
| Chajju v. Emperor (1921) 19 A. L. J. 856                         | 24 <sup>n</sup> |
| Jethabai Gokaldas v. Parshotom Hevsa (1920) I. L. R. 45 Bom. 987 | 14 <sup>n</sup> |
| Moore & Co. v. Landauer & Co. (1920) (1921) 1 K. B. 73           | 3 <sup>n</sup>  |
| Rex v. Hunter (1920) (1921) 1 K. B. 555                          | 3 <sup>n</sup>  |
| Vishun Narhar v. Shriram Raghunath (1920) I. L. R. 45 Bom. 983   | 13 <sup>n</sup> |

### REVIEWS.

|         |                                                                     |
|---------|---------------------------------------------------------------------|
| Reviews | 4 <sup>n</sup> , 8 <sup>n</sup> , 12 <sup>n</sup> , 13 <sup>n</sup> |
|---------|---------------------------------------------------------------------|

# The Calcutta Law Journal.

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CALCUTTA, JULY 1, 1921.

{ NO. I.

## UNROBED MAGISTRATES.

Magistrates, whether I. C. S. or B. C. S. (Executive Branch) have not hitherto been permitted to wear Court-robcs. No Magistrate can therefore insist on any Barrister, Vakil or Attorney wearing gowns when appearing before them. Vakils and Barristers do not wear gowns before High Court Judges when, unrobed, e.g. as in Chambers; nor before the High Court Registrars (of the Appellate and Original Sides), who are not entitled to wear Court-robcs. In 1917 Sir Edward Chamier, Kt. K. C., Chief Justice of the Patna High Court, told the writer not to wear his gown, when required to do so by the I. C. S. Sub-divisional Magistrate of Dinapore.

In the High Court there is absolutely no difference between Vakils and Barristers as to rules for wearing gowns. But at this late hour some of the subordinate Magistrates who are themselves clad in light summer suits are making an invidious distinction between Barristers and Vakils by insisting on High Court Vakil practitioners wearing gowns when appearing before them.

After the privilege of wearing gowns was granted to Vakils the High Court ordered subordinate Civil Courts also to wear robes, District Judges alone having the privilege from before. The universal Rule for the Bar is the well-known one requiring the Bar to wear gowns only before robed Courts. But the Barrister Chief Presidency Magistrate of Calcutta and, under his orders, his subordinate Presidency Magistrates both stipendiary and honorary, insist on all High Court practitioners, except Barristers and Attorneys, being robed when appearing before them, although these Courts themselves are not robed. Does not this action really amount to the subordinate Courts introducing a further disability with regard to Vakils not existing in the High Court? It is needless to say if this is done on the ground of

racial distinction it is out of place in a Court of Justice ; and, if as a distinction between the English and the Indian Bar, it would be an anachronism to-day when all such distinctions are being done away with.

Surely their Lordships of the Honourable High Court did not mean (in fact could never have meant) to order High Court Vakils (Indian Bar) to wear gowns before unrobed Service, Lawyer and Laymen Magistrates, while Barristers and Attorneys (English Bar) are not to be robed in their presence. Perhaps these Magistrates are anxious to wear gowns themselves. But are they entitled to do so ? And if they are not, should they be allowed to insult Vakils with impunity ? The writer has filed a stamped petition before Mr. Swinhoe, Bar-at-law, Chief Presidency Magistrate, Calcutta, asking him to make a reference to the Honourable High Court enquiring if Vakils should wear gowns before unrobed Courts. The Vakils (Indian Bar) are sure to get relief now from the High Court.

This anomaly of Vakils, i. e. Indian Bar as opposed to the English Bar (or Barristers and Attorneys), having to wear gowns before Criminal Courts who are clad in white summer suits is pushed at times to still further ludicrous situations. Recently one Subdivisional Magistrate regularly used to have his inspiration from lighted cigarettes between his lips while holding court. In a similar situation in another Court an unrobed Barrister also lit his cigarette while addressing a smoking Magistrate, but the unfortunate Vakils having their gowns on their backs could not very well imitate the Magistrate or the Barrister. Very recently another Subdivisional Magistrate wearing an immaculate white coat kept on smoking his pipe in Court with perfect nonchalance even when hearing a case in which both parties were English ladies. Of course he did not ask their permission to continue smoking. All the while the writer's opponent, a Vakil with his blue gown lent a touch of colour to the scene—truly a sight worthy of the gods ! All these Magistrates' Courts were within 30 miles of Calcutta. Can any one guess whether they were Lawyer or Service or Laymen Magistrates (European or Indian) ? It is needless to add that no robed Court would have been so unmindful of the dignity of the Court which should be maintained not only in the benighted provinces of Madras but also in Bengal.

As to colour effect, shortly after the establishment of the Patna High Court (which is an off-shoot of the parent Calcutta High Court) its first Chief Justice, the Honourable Sir Edward Chamier, gave his Vakils black gowns. If the blue gowns of Bengal and Assam Vakils

were also changed to black, perhaps Criminal Court Magistrates in these two Provinces might at last begin to comprehend that High Court Vakils are in no way inferior in status to Barristers, even if the former have the misfortune to appear in subordinate Courts.

G. Sircar (Lieutenant),

Vakil, High Court.

### NOTES ON CASES.

*Breach of contract—Tins of Canned fruit—Mode of packing, not as desired—Right to reject.*

In a contract for the sale of a large number of tins of canned fruits, there was a stipulation to the effect that the tins are to be packed in cases, each case to contain thirty tins, the price being payable at per dozen tins. When the goods arrived, it turned out that about one half of the cases contained twenty-four tins only instead of thirty. The question arose whether the buyers are entitled to reject the whole consignment or only the cases containing twenty-four tins.

*Held* that the buyers were entitled to say: "We must have the goods packed in the way we have contracted for" and that they are also entitled to reject the whole consignment.

*Substantive offence tried by one jury—Charge of being a habitual criminal tried by another jury.—Second trial, if proper.*

H was convicted by a jury of office breaking and larceny and afterwards another jury found that he was a habitual criminal and sentenced him to 3 years penal servitude. Against the second conviction there was an appeal and question arose whether the trial by another jury of the charge of being a habitual criminal was proper and with jurisdiction.

*Held*, that the charge of being a habitual criminal can only be tried by the same jury as convicted the accused of the substantive charge and that the trial by another jury was improper and bad in law.

R. M.

[1921] 1 K. B. 73.

1920.

Moore & Co.

Landauer & Co.

[1921] 1 K. B. 555.

1920.

Rex

Hunter.

## REVIEWS.

**The Indian Digest 1909-1920** by V. V. Chitale, B. A., LL. B., Commercial Press, Madras, 1921 :—We have received all the four volumes of the above digest and we are now able to form an opinion of its satisfactory character. It covers a period of twelve years and so far as we have been able to test, it embraces cases from all the reports published throughout India. The abstracts are accurate and concise and the arrangement of the topics is commendable. We have no doubt the digest will be found useful by a large circle of practitioners.

**The Working Constitution in India** by S. M. Bose, M. A., LL. B., Oxford University Press, 1921 :—Mr. Bose has inherited a great name and is himself a distinguished member of the legal profession and of the Bengal Legislative Council. This volume contains the Government of India Act, the two reports of the joint Select Committee, the report of the Meston Committee and a large body of relevant rules appertaining to the new constitution. No public man can do without the volume if he wishes to take a real interest in the working and the development of the new constitution and we have no doubt it will have a deservedly large circulation.

**Law affecting the rights and liberties of the Indian people** by A. K. Ghose, Bar-at-law; Mohun Brothers, College Street Market, Calcutta, Rs. 7-8 as. :—This book is indispensable to every intelligent member of the public at the present times as the liberty of the subject may be affected at any moment by reason of the most unexpected events. Mr. Norton who has done his full share in public life as a defender of the liberties of the people has very appropriately furnished an interesting introduction. We know of no other book which in an equal compass furnishes information of such vital interest and importance to the public.

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{ NO. 2.

## DEPOSIT OF RENT UNDER SECTIONS 61 AND 149 OF THE BENGAL TENANCY ACT.

In the Bengal Tenancy Act (Act VIII of 1885) "tenant" has been defined as a "person who holds land under another person and is but for a special contract would be liable to pay rent for that land to that person" and "rent" has been defined as "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use and occupation of the land held by a tenant." There are certain provisions in the act which enables a tenant to deposit the rent, and amongst those are sections 61 and 149. Under section 62 the Court shall receive the rent and under that section as well as under section 52 the Court shall grant a receipt to the tenant and such receipt shall operate as an acquittance. One going through the language of the sections 61 and 149 will find that these sections provide for the deposit of "money on account of rent." "Rent" includes both rent in money and rent in kind. Now the question arises whether a tenant who pays his rent in kind can deposit under sections 61 and 149. It has been observed by Mookerjee, J. in the case of *Sashi Bhushan v. Umakanta*, 20 C. L. J. at page 160, that no deposit can be made of rent in kind under sections 61 of the B. T. Act. It has also been held in the same case that section 61 of the B. T. Act is applicable to a case where the parties agreed that upon failure to deliver the rent payable in kind a fixed sum is to be paid in lieu thereof. In view of the above observations section 61 does not embrace a poor tenant who pays his rent in kind and there is no contract between him and his landlord that a fixed sum is to be paid in case of failure to pay the rent in kind. If the market value of the rent in kind be deposited in Court which the wordings of the section 61 do not allow the Court may refuse to take cognizance of such plea and

the landlord too, as the case may be, will not be bound to accept the sum or to act upon such deposit. Section 61 of the B. T. Act is an enabling section and if a tenant paying rent in kind be deprived of the use of the section how does he meet the difficulties for which the provisions of section 61 has been made by the Legislature. This can only be met with if the tenants be entitled to deposit the market-value of the rent-in-kind and clause 2 (a) of art. 2 of Sch. III of the B. T. Act be also made applicable to their cases. One question can be raised here that the amount deposited may not be the actual market value of the rent-in-kind and it may not be the full amount of the money due and thus the deposit will not be a valid one, which the landlord can ignore (18 C. W. N. page 84). This very point was raised in the case reported in 20 C. L. J. page 153, and the reasoning and findings of the eminent Judge can very well be applied to the case of a tenant paying rent in kind, although there is no contract between the parties, that in failure of payment of rent in kind a certain fixed sum is to be paid in lieu thereof. For in that case the landlord will be at liberty to withdraw the amount deposited in Court by his tenant after the service of notice and also to institute a suit within six months from the date of the service of notice of such deposit, for the balance, if any, which he considers to be due from the tenant. The question of the balance will be determined by the Court. Now if the observations made in 20 C. L. J. page 160 be stretched to the cases of tenants paying rent in kind, they cannot have the remedy allowed by section 149 of the B. T. Act, if the deposit of the market-value of the rent in kind be not recognised by law. Sub-section 3 of section 149 provides that unless the third person within three months from the receipt of notice institute a suit against the plaintiff and therein obtains an order restraining payment out of the money it shall be paid out to the plaintiff on his application. Thus a suit under sub-section 3 of section 149 is in the nature of an interpleader suit and the property in dispute is the money deposited in Court. The question of title as well as possession must be incidentally gone into for determining who must get the money (7 C. L. J. note page 40). Order 35, rule 5 of the Civil Procedure Code lays down that "nothing in this order shall be deemed to enable tenants to sue their landlords for the purpose of compelling them to interplead with any person other than persons making claim through such.....landlord." The result, therefore, is that an interpleader suit by a tenant can only be maintained if the defendant other than the landlord claims through the landlord (*Shelly Bannerjee*

v. *Raj Chandra Dutta* I. L. R. 37 Calc. 552). Obviously, therefore, a tenant cannot maintain an interpleader suit where one person claims the rent from the tenant as landlord while a third person claims the rent from the tenant adversely to the landlord. (*Vide* Mulla's Civil Procedure Code, sixth edition notes under Order 35, rule 5). In cases where such difficulty will arise the tenant can come under section 149 of the B. T. Act and drive the two claimants to interplead with each other and have a determination as to who is entitled to get the money. The object of section 149 is to prevent tenants from being harassed by disputes between two rival claimants to land in respect of which the rent is claimed. Where lies the remedy if a tenant paying rent in kind be not allowed to come under the purview of section 149, simply because the words inserted therein are "money...on account of rent."? The third party to whom the tenant pleads that rent is due being not a necessary party in the rent-suit any decision in such suit is not binding against him. The disastrous effect in some of such cases might be that both the claimants may institute separate suits for rent against the same tenant for the same holding and each of them might get separate decrees. It was held that a suit for rent proceeds only on two issues, *vis.* (1) Does the relationship of landlord and tenant exist between the parties, and (2) are the alleged arrears of rent due and unpaid. These are questions in which the plaintiff and the defendant alone are concerned and no third party claiming a title adversely to the plaintiff can properly be made a party to the trial of these issues. Because when a person sued for rent puts forward the plea of holding the land under and paying the rent to a third person the latter should not be joined in the suit so as to convert a simple suit for arrears of rent into a suit for the determination of title to the land in respect of which the rent is claimed (I. L. R. 8 Calc. page 238; 9 C. W. N. page 492). The legislature never intends to shut the gates of law and justice to one while it remains open to the other.

*Tootsidas Mukherjee,*

*Pleader, Khatra,*

District Bankura.



## REVIEWS.

**The Decennial Digest 1911-1920** by R. Narayanaswami Iyer, B.A., B.L., Vol. I ; Madras Law Journal Office, 1921 :—Mr. Narayanaswami Iyer has already rendered valuable service to the legal profession as a joint author of the consolidated digest 1909-1915 and of the yearly digest from 1916 to 1920. The decennial digest of which the first volume is now in our hands will cover the entire period between 1911 to 1920. The volume of Case Law has so rapidly increased in every presidency during the last five years that it is impossible for the profession to carry on its work without the assistance of a comprehensive digest, methodically arranged and accurately drawn up. The present work possesses these merits and its utility has been increased by numerous cross-references. We have tested the references at random and have not discovered any errors. The get up is excellent particularly in view of the high price of paper and the cost of labour.

**The Code of Criminal Procedure, 1898** by A. C. Guha, B. C. S., N. K. Gupta, B.L., and Y. Majumdar, M.A., M.L. ; B. C. Roy, 39-1 College Street, Calcutta, Rs. 15 :—Bengal lawyers have not latterly distinguished themselves as authors of Commentaries on Statutes and may well be proud of the work now before us. The object of the editors is to furnish an exhaustive commentary on the Criminal Procedure Code, 1898. The Judicial decisions have been collected and analysed and the results deduced therefrom have been crystallised into a series of propositions. Special care has been taken to bring out divergence of opinion. The arrangement of the notes is excellent and the classification must have been the result of considerable thought. The type and paper leave no room for criticism and the price for the whole work must be regarded as moderate when we remember the size of the book, the high quality of work and the present economic conditions.

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# The Calcutta Law Journal.

VOL. XXXIV. }

CALCUTTA, AUGUST 1, 1921.

{ No. 3.

## THE SUCCESSION CERTIFICATE ACT.

One cannot understand what useful purpose the Succession Certificate Act exactly fulfils in the domain of Procedure Law in some cases. Its main object only is to protect *bona fide* debtors who pay *bona fide* to representatives of deceased persons. These are protected only if they had obtained a succession certificate. It does not concern itself with the existence or non-existence of the debts concerned. Decisions as to rights of contesting claimants are of no value at all under this Act and the decisions of an inferior civil Court in a regular suit override the said decisions under the Act.

This Act introduces an inconvenient and unreasonable multiplicity of procedure. The same questions will have to be gone into both in the original petition and the original suit. It is the decision in the original suit that is given preference to. But strangely enough the suit already filed cannot be decided until you obtain a certificate under the Act. Whence comes this strange limitation on the power of the Court? Why cannot the Court decide in the case that the only son is the heir to the Hindu father's self-acquisitions, what need of a reference to the District Court for that? Given the same allegations of fact the Civil Court in a regular suit is more competent to decide the matter. An issue might be framed and the question decided. With respect to the suit also there is the same publicity and sanctity as the petition proceedings. Contesting claimants if any according to the allegations of the creditor plaintiff or debtor defendant may be added as parties and the suit proceeded with.

In a case where a suit has been filed already for the recovery of the debt there seems to be no reason at all why recourse should be had to succession certificate proceedings. If Government wants

that the movable assets of deceased creditors should be taxed extra and a uniform duty levied upon such effects if their recovery is sought, one would have no objection to such a plain statement of facts. But under guise of giving relief to the poor debtor harassed by rival claimants, the Government cannot be permitted to tax in addition to the ordinary  $7\frac{1}{2}$  per cent. they levy as court-fees another 2 per cent. or 3 per cent. on the value of the debts.

The value of summary proceedings by way of petition under the Act seems to lie when the debtor is willing to pay and he wants an indemnity or assurance that others would not harass him. But where there is the necessity of further litigation to realize the debt or there is a likelihood of such necessity arising, the regular suit must be the only procedure required to make one realize his dues and it is futile and trivial to insist that one has to get a succession certificate. In cases where the debt is of small amount also the procedure laid down is very harassing to the creditor and the expenses in the District Court more than cover up the amount of the debt and make its realization next to no use. In the interests of justice it seems necessary that the same sanctity be given to the decision of the Courts as to proceedings under the Succession Certificate Act and either a certificate or a decision of a proper Court must equally have the effect of indemnifying the creditor. To hold otherwise would be highly anomalous and the attention of the legislature must be immediately drawn to the provisions of this Act and section 4 of Act VII of 1889 amended accordingly.

Berhampore.  
The 19th July, 1921.

P. V. Chalapathi Rao,  
Pleader.

# The Calcutta Law Journal.

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VOL. XXXIV. } CALCUTTA AUGUST 16 TO NOV. 1921. { NOS. 4—10. . . .

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## OUR NEW JUDGE.

We beg to offer our cordial and respectful congratulations to the Hon'ble Mr. Justice Bepin Behary Ghose on his elevation to the Bench. Mr. Ghose comes from the District of Burdwan and is a brother of the late Sir Rash Behari Ghose. He was educated at the Presidency College, Calcutta and took his degree with Honours in English in 1888. He proceeded to the M. A. degree in English in 1889 and passed the B. L. Examination in 1891. He was articled to the late Babu Kishori Lal Sircar, an erudite member of the profession, who subsequently delivered a course of learned lectures on the Mimansa rules of interpretation in Hindu Law as Tagore Professor. Mr. Ghose was enrolled as a vakil of the High Court on the 6th April, 1892, and for sometime practised here. He had exceptional opportunities for valuable training in connection with the numerous cases in which his illustrious brother appeared. It is well-known that during this period and later on he materially helped his brother in the preparation of successive editions of his great work on Mortgages. Mr. Ghose subsequently went to Burdwan where he had considerable practice. In 1910, he resumed his work in the High Court and rapidly occupied a place in the front rank in the profession. In 1913 he spent some months in Europe.

Mr. Ghose has been known to all who have come into contact with him as an able and sound lawyer and as a fearless and conscientious advocate. But above all he is a true gentleman and his appointment has caused widespread satisfaction. There is little doubt that he will occupy a worthy place in the long line of distinguished Vakils Judges.

**Distribution of the High Court Benches.**

**Sanderson C. J. and Richardson J.**—Original Side appeals and Privy Council matters.

**Woodroffe and B. B. Ghose, JJ.**—First appeals from Groups II and III and rules relating to such appeals.

**Mookerjee, and Cumling, JJ.**—First appeals from Groups I and IV and rules relating to such appeals.

**Chatterjee and Panton, JJ.**—Second appeals, Miscellaneous appeals and rules from Groups II and III.

**Teunon and Suhrawardy, JJ.**—Appeals under O. 41, rule 11, C. P. C. from all groups and urgent applications relating to second appeals and miscellaneous appeals and motions from Groups I and IV and second appeals as may be arranged.

**Walmsley and Pearson, JJ.**—Criminal business.

**Newbould, J.**—Second appeals not exceeding Rs. 50, in value and Civil revision cases up to Rs. 1000 in value from all groups.

**Rankin, J., C. C. Ghose, J., Buckland, J.**—Original Side (Sitting singly).

**REVIEWS.**

**The Decennial Digest of Indian Decisions, 1911-20** by R. Narayanaswami Iyer, Vols. II and III, Madras Law Journal Office, 1921.—We have already noticed the appearance of the first volume of this digest. The second volume includes all the heads under "C" from Civil Procedure Code to Cypres. The third volume includes the titles under "D" to "L". These Volumes are marked by the same excellent features as the first. The arrangement is logical, the subheads are numerous and the cross references are ample. We notice however, here and there, misprints which do not affect the senses. We shall look forward for the fourth volume which will include some of the most important heads.

**Hindu Law** by J. R. Gharpure, 3rd edition, Price Rs. 10.—We welcome the third edition of this well-known treatise on Hindu Law by Mr. Gharpure, the distinguished lawyer of the Bombay High

Court. Mr. Gharpure has made a first hand study of the original authorities as is evidenced by the valuable collections known as the Hindu Law texts series. The present work was published sixteen years ago and rapidly went into a second edition. The present edition is fuller than the second edition but is still a book which the student should read from beginning to end. The statements are clearly and concisely expressed and although references are given to the latest decisions, including those published few months ago, the character of the book as a readable student's manual is well maintained. The valuable note on the term *Sapinda* which was a special feature of the previous editions has been enlarged and the other appendices have been improved. The original texts are either quoted or referred to with such precision as to make reference quite easy. The map, which shows at a glance the extent of the schools of Hindu law, has been corrected and is very attractive. The book should be read and not merely kept for consultation both by students and practising lawyers. The get up is all that can be desired and the price (Rs. 10) for a law book which covers five hundred pages must be considered cheap under present economic conditions.

**The Lawyer's Case Reference** by Kamala Kanta Datta, Dacca.—This handy volume is a reliable guide to the case law upon various subjects which practitioner's have to deal with in Court every day. For instance we turn to the head "adverse possession" and we find that various points which arise in connection with adverse possession are mentioned together with the relevant case law on the subject. There can be little doubt that the work of the practising lawyer will be immensely helped if he has the book in hand in Court for ready reference. There is a long list of corrigenda but the errors noted are generally trivial.

#### NOTES ON CASES.

*Partition suit—Defect in plaintiff's title at the time of the institution of the suit, if can subsequently be cured.*

V and G, two brothers owned the property in dispute. The plaintiff in the present partition suit derived title from one W, grandson of G (one of the defendants in the present suit). W was

I. L. R. 45 Bom. 983

1920.

Vishnu Narhar

Shriram Raghunath.

a minor at the time he purported to transfer his share to the plaintiff. Defendant No. 1, the main contesting party, derived title from V, brother of G. After the institution of the suit, as soon as it was discovered that the plaintiff owing to W's minority had no title, W having attained majority executed another sale deed in favour of the plaintiff. Defendant No. 1 contended that inasmuch as the plaintiff had no title at the time of the institution of the suit, the present suit is not maintainable and that the defect in plaintiff's title is not cured by the new sale deed.

*Held*, (per Macleod, C. J. and Fawcett, J.) that such a suit is maintainable and that the plaintiff's title is cured by the subsequent sale deed.

The learned Chief Justice remarked as follows: "It is quite true that if a plaintiff's title is discovered to be defective, in many cases that cannot be cured. But in a partition suit all parties are in the same position, and the obvious course for the trial Judge to pursue..... was to make W, a plaintiff..... It seems to me therefore, this is merely a matter of form."

R. M.

#### *Will by two persons, if valid.*

I.L.R. 45 Bom. 987

1920.

Jethabhai Govaldas

Parshotam H. vsa.

The question in this appeal was whether it was possible for two persons to make a conjoint valid will. L and his wife S made a joint will sometime before their death. L died first and S died three days afterwards. An application was thereafter made for a probate of the will. The District Judge held that the will was a genuine document but refused probate on the ground that it was not possible for two persons to make a conjoint will. The matter came up before the High Court on appeal and it was *held* (per Macleod, C. J. and Fawcett, J.) that such a will is recognised by the English Courts and that it is a perfectly valid will.

*Minakshi Ammal v. Viswanatha Aiyar* (I.L.R. 33 Mad. 406) followed.

R. M.

# The Calcutta Law Journal.

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CALCUTTA DECEMBER, 1921.

{ NOS. 11—12. }

## THE LAWYER IN LITERATURE.\*

The lawyer's business is to understand and direct the business affairs of others. He is the expert who defines for his client his duties and obligations, and aids him in the securing of his rights and privileges. His duty to his client at times appears to require him to disregard abstract justice, and this has resulted in his being frequently represented by writers as resorting to deceit and sophistry in order to succeed with this cause. Dickens very aptly expresses this thought through Mr. Pickwick, when he argues with Mr. Snubbin thus :

" Gentlemen, of your profession, sir, see the worst side of human nature. All its disputes, all its ill-will and bad blood, rise up before you. You know from your experience of juries (I mean no disparagement to you or them), how much depends upon effect ; and you are apt to attribute to others, a desire to use, for purposes of deception and self-interest, the very instruments which you, in pure honesty and honor of purpose, and with a laudable desire to do your utmost for your client, know the temper and worth of so well, from constantly employing them yourselves. I really believe that to this circumstance may be attributed the vulgar but very general notion of your being, as a body, suspicious, distrustful, and overcautious."

Whatever the failings of the lawyer in this respect, the fact remains that there has been a general want of confidence in the profession ; and, aside from the adverse influence of a small proportion of the legal profession, the writers of drama and fiction are almost wholly responsible for the attitude of the public mind towards the lawyer. Otto Erickson in " Law Notes," April, 1916, in speaking of the lawyer, says :

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\* An article published in the Canadian Law Times, Vol. 41, p. 566—Ed.



"Always do we find him attacked by literary genius as an enemy to society, ridiculed as a parasite, and denounced and reviled as something little better than a criminal and much worse than a rogue."

Students who have undertaken, in a serious way, a study of the several professional callings, have placed the lawyer on a comparatively high plane, but the novelist and poet as a rule approach the subject from a different standpoint. They are usually looking for the sensational, and coupled with a desire for the sensational, there is generally a want of sincerity, and so, through the whole realm of lighter literature, the lawyer has been held up as a shrewd, conscienceless half-idle, loitering opportunist, always a partisan, who clouds the issue with "legal English", and by means of technicalities perverts justice, and who, with genteel suavity, supplies a necessary element in the plot by playing the evil part in a "lawful" way and drawing his retainer.

This treatment, however, is not confined to fiction, for in the pages of Holy Writ we find the lawyer the object of scorn and generally regarded as identical with the Scribes. When Christ was questioned by the lawyer, who asked Him, "Master, which is the great commandment in the law?" He answered fully and argued eloquently, and then rebuked openly, saying, "Ye serpents, ye generation of vipers, how can ye escape the damnation of hell?" and in St. Luke, He addresses the lawyer thus: "Woe unto you also, ye lawyers, for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."

A favorite notion among writers of fiction respecting the lawyer is that his fees are mere compliments to his shrewdness, and that his success is determined by his ability to inveigle his client into the payment of a generous sum. On this score, Æsop added his thrust at the legal profession in that artful fable, "The Litigious Cats," wherein the monkey is depicted as judge, deciding the ownership of a piece of cheese which is claimed by each of the cats. The decision of the wise and just magistrate awarded the cheese to the litigants in equal proportions, but having difficulty in making an exact division, the judge proceeded alternately to bite off a portion of the larger morsel until both pieces were, to the alarm and dismay of both litigants, wholly consumed.

It may be that lawyers will recall reading the ancient rhyme, "The Old Saw," which was published in Harper's Monthly in 1856:

An upper mill and lower mill,  
 Fell out about their water;  
 To war they went—that is to law,  
 Resolved to give no quarter.  
 A lawyer was by each engaged,  
 And hotly they contended;  
 When fees grew scant, the war they waged,  
 They judged were better ended.  
 The heavy costs remaining still,  
 Were settled without pother;  
 One lawyer took the upper mill,  
 The lower mill the other.

Going so far back as Chaucer, a reference is made to the "serjeant of the law" illustrating the self-assumed importance of the lawyer in the lines :

"Noher so bisy a man as he there nas,  
 And yet he semed bisier than he was."

Early in the Elizabethan period, Sir Thomas Moore, who had been Lord Chancellor of England, endeavoured in his "Utopia" to get rid of lawyers by the following process of reasoning :

"They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters, and to wrest the laws and therefore, they think it is much better that every man should plead his own cause, and trust it to the Judge, as in other places the client trusts it to a counsellor. By this means, they both cut off many delays, and find out truth more certainly; for after the parties have laid open the merits of the cause, without those artifices which lawyers are apt to suggest, the Judge examines the whole matter, and supports the simplicity of such well-meaning persons, whom otherwise crafty men would be sure to run down; and thus they avoid those evils which appear very remarkably among all those nations that labor under a vast load of laws."

Readers of Shakespeare will recall the Grave Digger's Scene (Hamlet, Act V, Scene 1), in which Hamlet and Horatio coming upon the grave-diggers as they overturn various and sundry skeletons, pick up a skull, and Hamlet, as he turns it in his hands, soliloquizes thus :

"Hamlet: There's another; why may not that be the skull of a lawyer? Where be his quiddities now, his quillits, his cases, his tenures, and his tricks? Why does he suffer this rude knave now

to knock him about the scone with a dirty shovel, and will not tell him of his action of battery ? Hum ! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries ; is this the fine of his fines and the recovery of his recoveries, to have his fine pate full of fine dirt ? Will his vouchers vouch him no more of his purchases, and double ones, too, than the length and breadth of a pair of indentures ? The very conveyance of his lands will hardly lie in this box ; and must the inheritor himself have no more, ha ?

Hor. Not a jot more, my lord.

Ham. Is not a parchment made of sheep-skins ?

Hor. Ay, my lord, and of calf-skins, too.

Ham. They are sheep and calves which seek out assurance in that."

In Henry Sixth (part 2, Act IV, Scene 2), Dick, the butcher, speaking to his friend, Jack Cade, says :

"The first thing we do, let's kill all the lawyers," and Cade replied : "Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment ? That parchment, being scribbled o'er, should undo a man ? Some say, the bee stings ; but I say, 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since."

In the later Elizabethan period, Ben Jonson, in his play, "The Fox," pictures the lawyer in these lines :

"I oft have heard him say how he admired  
Men of your large profession, that could speak  
To every cause, and things mere contraries,  
Till they were hoarse again, yet all be law ;  
That with most quick agility, could turn  
And return ; make knots and undo them ;  
Give forked counsel ; take provoking gold  
On either hand and put it up ; these men  
He would trive with their humility  
And (for his part) he thought he would be blest  
To have his heir of such a suffering spirit,  
So wise, so grave, of so perplexed a tongue  
And loud withal, that would not wag nor scare  
Lie still without a fee ;....."

When Dr. Samuel Johnson was asked what he thought of supporting a cause which he knew to be bad, he replied : "Sir, you do

"not know it to be good or bad 'till the Judge determines." Thus he was far more generous than the Utah territorial legislature in 1850, which forbade any counsel to urge a cause in which he himself did not believe, while on the other hand, the Act of 1852 required the advocate, under penalty of fine, to disclose "*all the facts* in his possession, even though they were calculated to make against his client," Laws of Utah, 1866, p. 37.

Modern writers in general seem to be excessive in their criticism of the lawyer, and none more so than the late Elbert Hubbard, whose denunciations were rabid, vitriolic and at times apparently insincere. In spite of this, however, his scathing tirades struck a popular chord—and no one knew it better than Hubbard, for he never let pass an opportunity to gain applause by ridiculing the lawyer.

In June, 1913, and in April, 1914, so conservative a periodical as The Atlantic Monthly gave space to "The Cage," by Arturo M. Giovannitte, and "Justice," by Riginald Wright Kauffman, poems in free verse, holding up to ridicule our whole system of criminal jurisprudence. The same publication, in December, 1920, however, contains a very well-written story, "The Preponderance of Evidence," by James Park, which portrays two types of lawyers. The defendant is represented by the well-prepared, able, corporation lawyer, smooth and oily, who relies upon the application of a technical rule by a cold and harsh judge; the plaintiff by inexperienced and ill-prepared counsel. The cause of the deeply wronged plaintiff appears to be at sea between the two until the jury, by the application of common sense, finds justice in spite of judge and lawyers.

The "Lawyer's Number" of Life, Feb. 8, 1917, contains a collection of absurdities which are at once brilliant and humorous, and it must be admitted, illuminating. The cover-design, entitled "Fiat Justitia, Ruat Coelum," represents Justice with one bleary eye peeping from her blindfold, as she groggily attempts to balance her rickety scales; and the double page illustration shows eight cold, calculating, bloodless lawyers, their faces buried in huge volumes, forming a line between the law-books piled up in front of them and the great sun of Justice behind them. It is unapologetically called "A Barrier to Progress" (and there's no doubt of the application of the word "Barrier.")

Many of the profession are familiar with Spoon River Anthology, in which Edgar Lee Masters sets forth an honest expression from various and sundry late lamented individuals—the doctor, the

teacher, the laborer, the magnate. John M. Church, the lawyer, responds thus :

"I was attorney for the "Q"  
 And the Indemnity Company which insured  
 The owners of the mine.  
 I pulled the wires with judge and jury,  
 And the upper courts, to beat the claims  
 Of the crippled, the widow and orphan,  
 And made a fortune thereat.  
 The Bar Association sang my praises  
 In a high-flown resolution.  
 And the floral tributes were many—  
 But the rats devoured my heart  
 And a snake made a nest in my skull !"

An extreme free-verse poem by Carl Sundberg, entitled "The Lawyers Know Too Much", has been given some publicity, especially through its publication in *The Dial* in January, 1920. Three stanzas will serve to reflect the spirit of this effort :

Why is there always a secret singing  
 When a lawyer cashes in ?  
 Why does a hearse horse snicker  
 Hauling a lawyer away ?  
 The word of a brick layer goes to the blue,  
 The knack of a mason outlasts a moon,  
 The hand of a plasterer hold a room together,  
 The land of a farmer wishes him back again.  
 Singers of song and dreamers of plays  
 Build a house no wind blows over.  
 The lawyers—tell me why a hearse horse snickers  
 Hauling a lawyer's bones.

It may well be doubted whether the service the lawyer has rendered to society is generally understood and consequently appreciated. Far greater popular gratitude is accorded to the teacher and the physician. Occasionally, however, we are favoured with a literary production which is neither jocular nor sarcastic, but serious and truthful in appreciation of the legal profession. We are indebted to Dr. Samuel Warren, scholar, publicist, doctor of medicine, and practitioner at the bar, who in 1841 published that famous satire, "Tittlebat Titmouse or Ten Thousand a year," wherein he pictures Oily Gammon as "one of the most subtle and delectable scoundrels in literature," with Quick and Snap as worthy partners ;

and he sets opposite them the honorable and upright firm of Parkinson and Remington, and draws a picture worthy the highest type in the legal profession:

The commentary of Woodrow Wilson in a recent address before the New York Bar Association, in compliment to the lawyer, is of interest. He said in part:

"We lawyers are servants of society; officers of the courts of justice. Our duty is a much larger thing than the mere advice of private clients. In every deliberate struggle for law we ought to be the guides, not too critical and unwilling, not too tenacious of the familiar technicalities in which we have been schooled, not too much in love with precedents and the easy maxims which have saved up the trouble of thinking, but ready to give expert and disinterested advice to those who purpose progress and the readjustment of the frontiers of justice.

Lawyers constructed the fabric of our State governments and of the government of the United States, and throughout the earlier periods of our national development presided over all the large processes of politics. Our political conscience as a nation was imbedded in our written fundamental laws. Every question of public policy seemed sooner or later to become a question of law, upon which trained lawyers must be consulted. In all our legislative halls debate thundered in the phrases of the written enactments under which our legislators and our Governors exercised authority. Public life was a lawyer's forum. Laymen lent their invaluable counsel, but lawyers guided and lawyers framed the law."

Sir Walter Scott, having been himself a lawyer, reflects the profession as serious, purposeful, dauntless, patient, loyal to those whom it serves, and possessing a high sense of justice and equity. There is perhaps no more remarkable scene in literature than that portrayed by Scott in "The Heart of Midlothian." The solemnity and dignity of the trial, the inexorable adherence to the law of the land, the painstaking effort to discover the exact truth beginning with the administration of the oath by the presiding judge (not by an inferior court officer), and repeated by the witness: "The truth to tell and no truth to conceal, as far as you know or should be asked in the name of God and you shall answer to God in the great day of judgment,"—inspire a respect for the courts, for the administration of justice and for the advocate, the like of which is rarely found in literature. It is interesting to note that this famous trial as adapted to the stage by Dion Bouccicault became a favorite scene

with the famous actor, John T. Raymond, who said that he "hated all court-room scenes except those of the Merchant of Venice and the Heart of Midlothian." A brief excerpt from the Judge's charge to the jury reflects the spirit of dignity, mercy and justice which pervaded the trial :

"It is for the jury to consider whether the prosecutor has made out his plea. For myself, I sincerely grieve to say that a shadow of doubt remains not upon my mind concerning the verdict which the inquest had to bring in. I would not follow the prisoner's counsel through the impeachment which he had brought against the statute of King William and Queen Mary. I and the jury are sworn to judge according to the laws as they stood, not to criticize, or to evade, or even to justify them. In no civil case would a counsel have been permitted to plead his client's case in the teeth of the law ; but in the hard situation in which counsel are often placed in the Criminal Court, as well as out of favor to all presumptions of innocence, I have not inclined to interrupt the learned gentleman, or narrow his plea. The present laws, as it now stands, has been instituted by the wisdom of our fathers, to check the alarming progress of a dreadful crime ; when it is found too severe for its purpose, it will doubtless be altered by the wisdom of the legislature ; at present it is the law of the land, the rule of the court, and, according to the oath which you have taken, it must be that of the jury.

"I do not state the impression upon my own mind with the purpose of biasing yours. I have felt no less than you have done the scene of domestic misery which has been exhibited before you ; and if you, having God and a good conscience, the sanctity of your oath, and the regard due to the law of the country, before your eyes, can come to a conclusion favorable to this unhappy prisoner, I should rejoice as much as any one in Court ; for never have I found my duty more distressing than in discharging it this day, and glad I would be to be relieved from the still more painful task which would otherwise remain for me."

When Mark Twain wrote "Pudd'nhead Wilson," he apparently had no intention of giving the lawyer a prominent place in the story, but as the tale progressed, Pudd'nhead grew until he became its outstanding figure. Here was an individual of rare talents, obscure and unappreciated, earning a bare living, devoted to the study of finger-prints as a diversion, but all the time "keeping up his law." The opportunity finally came when his industry was rewarded. With tireless earnestness, he solves a baffling mystery and brings justice out of the tangle.

Charley Steele, in Parker's "Right of Way," is a very different type—cold, ambitious, shrewd. His success was largely due to his powers of persuasion. This lawyer does not enlist the reader's sympathy, but he is a fine example of acumen, and undaunted courage.

A notable piece of fiction, in which lawyers enact the leading roles, is "Mr. Crewe's Career" by Churchill. Hillary Vane, the shrewd, capable, politic corporation lawyer, is concerned chiefly in the manipulation of legislators. He is wholly without sentiment excepting in the love of his son, Austin. The son is cast in an entirely different mold, however. Independent, honest, direct and fearless, he risked estrangement from father and friends to follow the line of duty as he saw it. He attacked the corporation of which his father was chief counsel. He refused bribery and stood fast against every temptation. Austin Vane stands out as one of the most admirable characters in legal fiction.

Biography is a phase of literary expression that deserves mention here. "The Honorable Peter Sterling," an excellent example of biographical fiction, tells the story of a lawyer, Grover Cleveland, who through steadfast devotion to high principle, proved himself a heroic public servant; and another excellent contribution to biographical literature has recently appeared in "The Life of John Marshall" by Albert J. Beveridge.

In literature, we find the lawyer praised as well as censured, commended as well as ridiculed; and occasionally from one who plays upon his foibles and his shortcomings, we get the most exalted sentiments on the administration of justice, —such as from the lips of Portia, when she says:

"The quality of mercy is not strained,  
It droppeth as the gentle rain from heaven  
Upon the place beneath; It is twice blest;  
It blesseth him that gives, and him that takes:  
'Tis mightiest in the mightiest; it becomes  
The throned monarch better than his crown;  
His sceptre shows the force of temporal power,  
The attribute to awe and majesty,  
Wherein doth sit the dread and fear of kings;  
But mercy is above this sceptred sway;  
It is enthroned in the hearts of Kings,  
It is an attribute to God himself;  
And earthly power doth then show likest God's  
When mercy season's justice. Therefore, Jew,



Though justice be thy plea, consider this,  
That, in the course of justice, none of us  
Should see salvation: We do pray for mercy;  
And that same prayer doth teach us all to render  
The deeds of mercy."

FRANK EVANS.

### NOTES ON CASES.

19 A. L. J. 836.

1921.

Chajju

v.

Emperor.

*A magistrate failing to recall witnesses examined by his predecessors—Order of acquittal, if legal—Order for security after conviction for simple hurt, if good in law.*

- The accused in this case was charged under sections 147 and 323 I. P. C. and placed on trial before a magistrate. This gentleman took the prosecution evidence but before the defence evidence was taken he was transferred. Before his successor an application was made on behalf of the accused to resummon and rehear the witnesses that have already been examined and as a matter of fact the magistrate passed an order that this should be done. But in spite of this the magistrate took up the case and disposed of it upon the evidence on the record, which he had not himself heard. The order he passed was an order of acquittal which was subsequently discharged by the District magistrate. Question arose whether the District Judge had any power to revise what was an order of acquittal.

*Held* (per Lindsay J.) that the order of acquittal was an absolutely illegal order and that the District magistrate has certainly authority to set aside the same. The trying magistrate acted in violation of the clear provisions of section 350 Cr. P.C. and it was his duty to send for the witnesses and take their statements.

- *Held* further that offences under Sections 323 & 325 I. P. C. are offences involving a breach of peace and that when persons are convicted under either of these sections they may be bound over to keep peace under section 106 Cr. P.C.

R. M.